Public Utilities

FORTNIGHTLY

February 20, 1930

PUBLIC UTILITIES REPORTS, INC.
WASHINGTON, D. C.

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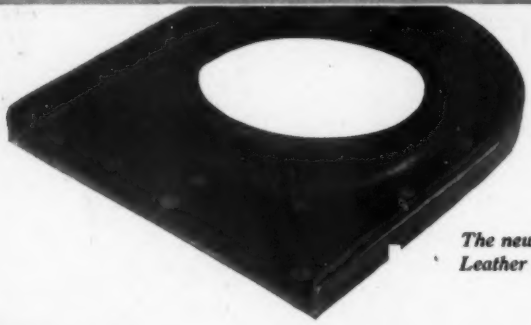

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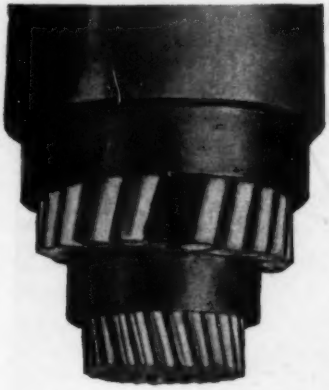
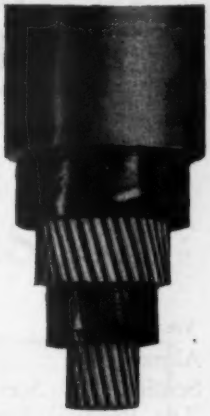


PAPER CAMBRIC RUBBER



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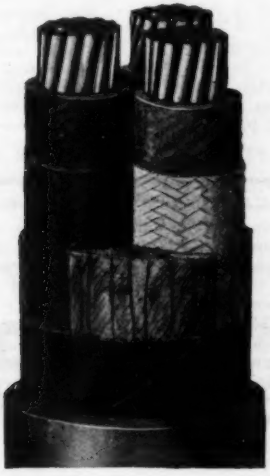

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Public Utilities Fortnightly

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PUBLIC UTILITIES REPORTS, INC., PUBLISHERS

PUBLIC UTILITIES FORTNIGHTLY, a magazine dealing with the problems of utility regulation and allied topics, including the decisions of the state commissions and courts; now issued in conjunction with Public Utilities Reports, Annotated; endorsed by the National Associations of the Utility Industry and by the National Association of Railroad and Utilities Commissioners, and supported in part by those conducting public utility service, manufacturers, bankers, accountants and other users of the publication.

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Pages with the Editors

NEVER before have the public utilities figured so prominently in the national spotlight—nor has their course of development been under more extensive scrutiny.

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GOV. ROOSEVELT of New York has projected the power situation boldly into the political arena; his Commission on Revision of the Public Service Commission Law, which has just concluded its hearings, promises to lead to important developments.

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WHAT is to be the outcome of all these controversies? How will these important problems be settled? To quote the schoolboys' standard graduation essay, "whither are we drifting?"

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FOR answers to these very leading questions, PUBLIC UTILITIES FORTNIGHTLY is fortunate in presenting the opinions of two outstanding figures, both men who guide public sentiment—and who represent different and conflicting beliefs.

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IN the coming issue of this magazine—out March 6—will appear the views of two such leaders: SENATOR GEORGE W. NORRIS, of Nebraska, perhaps the most implacable critic of the utilities, and the HON. EDWARD N. HURLEY, former Chairman of the U. S. Shipping Board and a publicist who has rendered distinguished service to his country in both peace and war.

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THESE two distinguished Americans bring to these national problems wholly different points of view, and arrive at wholly different conclusions.

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EVERY reader of this magazine will find these two articles provocative and stimulating to discussion.

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AND he will—if he is a reader of convictions—approve of one of the articles as definitely as he disapproves of the other.

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BUT it is out of such divergences of opinion and exchange of views that the truth is eventually revealed and the solution of problems found.

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MERTON KIRK CAMERON, Professor of Economics and head of the Department of Economics and Business at the University of Hawaii in Honolulu, is one of the few economists who have really delved into the question as to whether the state public service commissioners should be appointed or elected.

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(Continued on page VIII)

WHICH method best serves the public interest?

* *

THE obvious answer is the method which insures the selection of men who are best qualified for their tasks and which enables these men to function with the greatest freedom from pressure from the political interests on one side and from the utility interests on the other.

* *

IN view of the differences of opinion that are constantly cropping up on this question—(at the present time two states are considering changing their methods of selecting commissioners)—the factors which PROF. CAMERON analyzes are of more than mere academic interest.

* *

PROF. CAMERON was born in Maryland in 1886; received his B. A. degree from Princeton in 1908 and his Ph.D. in economics from Harvard in 1921.

* *

IN 1920 he was appointed Assistant Professor of Economics at the University of Oregon, where he introduced the study of public utilities, which he developed into an important element in the curriculum.

* *

LOUIS BENEDICT, whose views on "value" as a base-rate are expressed on pages 223 to 227, is a New York attorney who has specialized in public utility work for several years.

* *

HE is a graduate of Trinity College, '88; received his M. A. degree in 1891; was admitted to the New York bar in 1890; practiced law in the mountains of Tennessee and Kentucky for two years, and then returned to New York, where for the past twenty years he has been on the legal staff of the Consolidated Gas Company.

* *

"MY article," specifically warns MR. BENEDICT, "represents my personal opinions only; it does not express the point of view of the Consolidated Gas Company."

* *

WHILE everyone else interested in the Government Ownership controversy seems to be choosing up sides and debating the pros and cons, DR. HERBERT B. DORAU has gone quietly about his business of ascertaining the real facts with that unbiased zeal for truth that is characteristic of a scientist.

* *

IN his article on pages 216 to 220 the author gives no interpretations, no conclusions and no speculations. He merely provides, in an interesting and readable manner, fuel with which both sides may stoke their fires.

AFTER receiving both his B. A. and M. A. degrees from Laurence College, and his Ph. D. from the University of Wisconsin, DR. DORAU taught economics at the latter institution from 1921 to 1924; while there he offered the first course in urban land economics—which was then an entirely new field.

* *

FROM 1915 till 1929 he was on the faculty of the Northwestern University School of Commerce, where he devedoped an extensive curriculum of instruction in public utilities and at the same time directed the utility research work of the Institute for Research in Land and Public Utility Economics.

* *

SINCE August, 1929, DR. DORAU has been connected with August Belmont & Co., of New York, as an economist.

* *

IN addition to his numerous writings for the magazines, DR. DORAU has several books to his credit; among them are "Urban Land Economics," (with A. G. Hinman); "Real Estate Merchandising," and "Materials for the Study of Public Utility Economics"—the latter shortly to be published by Macmillan.

* *

ROGER W. BABSON, whose views on what the power of public opinion has meant and will continue to mean to the gas utilities will be found on pages 204 to 207, is too widely known as an economist and statistician—(and incidentally as a contributor to PUBLIC UTILITIES FORTNIGHTLY)—to need any further introduction to our readers.

* *

JOHN T. LAMBERT, whose informative commentary on trends and personalities in the public utility field is now a regular feature of this magazine, (see pages 228-229) is one of the most experienced of that select group of newspaper men designated as "Washington correspondents."

* *

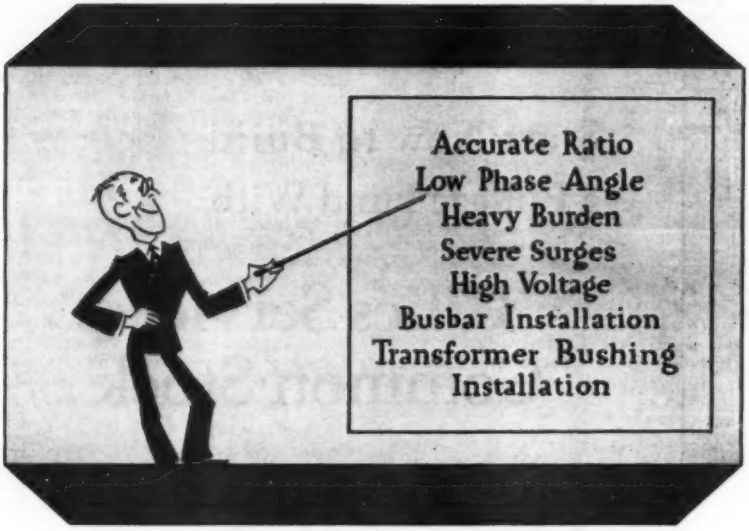
JUST how the name of the company of which one of our recent contributors, W. M. MCFARLAND, is General Attorney and Secretary was incorrectly given in these columns (in the January 23 issue) as the "Central Public Service Company of Indiana" is a slip that cannot be airily blamed upon the printer.

* *

THE corporate name of the organization is Central Public Service Company; the "of Indiana" just attached itself to it in some inexplicable manner—perhaps in a typographical effort to claim another author for a state that has produced TARKINGTON, ADE, RILEY and a host of other literary men. *Excuse-it-please!*

—THE EDITORS.

What... *and* How Much?



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FEBRUARY

Reminders of Coming Events — **ALMANACK** — *Notable Events and Anniversaries*

20	T*h*	Large railroads were enjoined from crippling small competitors by the terms of the Elkins Anti-Rebate Bill, signed by PRESIDENT ROOSEVELT, 1903.
21	F	The legislature of West Virginia passed an act creating the Public Service Commission, to be effective ninety days from passage, 1913.
22	S*a*	California's first railroad, 22½ miles long, between Sacramento and Folson, was opened for service, 1855. ¶ *Washington's Birthday.*
23	S	PHILIPP REIS, a German, invented a device that would transmit sound of a constant pitch over a wire, but was incapable of transmitting continuous speech, 1861.
24	M	FRANK J. SPRAGUE'S attempts to operate a trolley car called forth the newspaper headline: "Lincoln Set the Negroes Free; Sprague Has Set the Mule Free!" 1888.
25	T*u*	The first train was operated on the Milwaukee & Waukesha Railway (now the Chicago, Milwaukee, St. Paul & Pacific R. Co.) between Milwaukee and Waukesha, Wis., 1851.
26	W	The Board of Railroad Commissioners of the State of Montana came into existence, 1907. ¶ *A World Power Conference will be held in Berlin, Germany, June 16-25, 1930.*
27	T*h*	Illinois passed the General Improvement bill, known as the "General Insanity Bill," providing for construction of 8 railroads and improvements on 3 rivers, 1837.
28	F	The American Telephone and Telegraph Company was incorporated in New York "for the development of long distance telephone service," 1885.

MARCH, 1930

1	S*a*	U. S. Supreme Court first decided that private property devoted to public use is subject to regulation, in the case of Munn *vs.* Illinois, 1877.
2	S	Congress passed a law establishing the standard gauge of tracks of the Pacific Railroad and its branches at 4 feet, 8½ inches; 1863.
3	M	U. S. Congress voted an appropriation "for explorations and surveys to ascertain the most practical route for a railroad from Mississippi River to the Pacific," 1853.
4	T*u*	Regular steamship traffic across the Atlantic was initiated by two ships *"Washington"* and *"Hermann,"* owned by American and German capital, 1847.
5	W	The Railroad Commission of Nevada, predecessor of the present Public Service Commission, was created by an act of the state legislature, 1907.

"He who goes not forward goes backward!"
—GOETHE

Sentinels of Service

"Silhouetted against the sky rise the silent towers of industry that are outward symbols of the power created by the huge engines that throb below —the stirring heartbeats of the Modern City."

Public Utilities
FORTNIGHTLY

VOL. V: NO. 4 FEBRUARY 20, 1930

The Political Pressure on the State Commissioners

Are the decisions of the regulatory bodies less likely to be influenced if its members are elected rather than appointed to office?

BY MERTON K. CAMERON, PH.D.
PROFESSOR OF ECONOMICS, UNIVERSITY OF HAWAII

THE past decade has been characterized by growing dissatisfaction with the functioning of our Public Service Commissions. This dissatisfaction has recently culminated in an insistent demand for their complete reorganization.

The first step in this direction usually suggested is a change in the procedure of choosing the Commissioners.

In states where the prevailing method of selection is appointment, popular election is demanded. On the other hand, where this is the prescribed mode of procedure, appointment by some public official is advocated with equal vehemence. This difference of opinion raises the question as to which is the better method. As in the case of most governmental devices, a categorical answer to this query is difficult, to say the least, since the success of governmental institutions usually depends as much upon the character of the people working them as upon the mechanism of the institutions themselves. This being so, it does not necessarily follow that that method of choosing Public Service Commissioners which is best for one state will be best for another.

Still, sufficient homogeneity probably exists among the people of the United States to justify a comparison of the advantages and disadvantages of popular election versus appointment of Public Service Commissioners possessing some degree of universal validity.

OPPONENTS of popular election of Public Service Commissioners contend that it places the selection of the Commissioners in the hands of the consumers of public utility services, a group vitally interested in their decisions, since they constitute at the present time a majority of the electorate in the various states. Hence, they say, Commissioners are confronted when so chosen with the dilemma of either rendering decisions with an "eye" to their effect on the consumer-electors or of being removed from office at the first opportunity. In the former event, it is argued, the investors in public utility securities, (many of whom are recruited from the weaker groups of society economically), suffer unjustly, while in the latter, the regulation of these industries is placed in the hands of an endless stream of novices. This evil of popular election, they contend, is avoided to a considerable extent, at least, under the system of appointment since the appointing official will tend to act as a buffer between the Commissioners and those affected adversely by their decisions.

THE above criticism of popular election is unquestionably justified. A recent study[1] of the experience of Oregon with popular election showed that it resulted there in a tendency for Commissioners to be punished for unpopular decisions by removal from office, a consideration causing a rapid turn-over of Commissioners. This same study also disclosed a tendency for the decisions of particular Commissioners to be influenced by the opinion of their constituents. Whether appointment would remedy this defect of popular election would obviously depend largely upon the character of the appointing official. If he did not entertain a high conception of his duty, it is conceivable that the situation might be rendered even worse since under such an assumption the Commissioners would be subjected not only to the caprice of the electors as registered in his mind but also to his personal whims. A situation of this kind, however, is very unlikely to arise if the appointing official is the governor of the state concerned, since our state governors are usually men of reasonably lofty social ideals. It would seem logical to conclude, therefore, that the method of appointment, if the appointing official is a state governor, is less likely to subject the Commissioners to political influences than that of popular election.

IT is only fair to note that the aforementioned evil of popular election may be mitigated somewhat by the practice of electing Commissioners by district. Where Commissioners are so chosen, the tendency seems to be for those whose constituents are not affected by a case before them to be motivated in rendering their decision more by the facts of the case than by public opinion in the interested dis-

[1] See *Journal of Land and Public Utility Economics*, Feb. 1929, pp. 48-61.

Advocates of the Appointment-Method of Creating State Commissioners Contend—

(1) The popular elections place the selections in the hands of consumers of utility service—a group that constitutes a majority of the electorate:

(2) That elected Commissioners are confronted with the dilemma of either rendering decisions with an eye on the political effects—or of being removed from office:

(3) That men well-equipped for office as Commissioners are usually unwilling to enter the political arena.

tricts. This consideration assumes an added significance when we recall that many of the cases before Public Service Commissions are confined to very restricted geographical areas. The beneficial effect of electing Commissioners by district, however, is offset to a considerable extent by the apparent tendency for Commissioners so chosen to decide in favor of their districts when decisions involve a conflict of local and general interest. Furthermore, if the Commission has three members, two elected by district and one from the state-at-large, the more populous district is apt to exert an unduly large influence on the deliberations and decisions of the Commission since the political pressure from that district on the member elected from the state-at-large is likely to be greater than that exerted by his constituents in the district with the smaller population.

In some cases, this may result in the sacrifice of the interests of the citizens of the less populous district.

It is quite probable, also, that the recent tendency toward a wider distribution of public utility securities among the consumers of public utility services will eventually operate to decrease, to some extent, the temptation for elected Commissioners to be influenced in rendering decisions by public opinion. Under such conditions, irrespective of whether Commissioners vote for or against the utility, a large antagonistic group among the electors is sure to be aroused. The obvious course for them to pursue in such an event is to decide the case involved on the basis of the facts presented so that they can defend their position, if necessary, before that group which considers its interests sacrificed.

As things have stood in the past, Commissioners did not usually have to fear the political effects of a decision against a public utility, however unjust it may have been, since few of their constituents were either aggressively interested in seeing these businesses secure a "square deal" or, if so disposed, sufficiently well acquainted with their operation to know when they were treated unjustly. It

is probable that the realization of this explains to some extent, at least, any temptation that may have existed in the past for the utility managements to influence the decisions of Commissions in their favor. If this is so, then any change in the system of public utility regulation operating to decrease the fear of public utility executives of being imposed upon by the regulatory bodies will tend to lessen the temptation for them to tamper with their functioning.

A MORE serious indictment of popular election of Public Service Commissioners by the proponents of appointment, is that it does not result in the selection of as competent men as by appointment. This, they say, is because men well equipped for the position of Commissioner are usually unwilling to enter the political arena, and even when they are so disposed, the electorate in casting its vote is apt to be motivated by other considerations than the qualifications of the candidates for the office. All this may be avoided, they contend, by appointment. The appointing official can both select men who would not become candidates under the electoral system, and ascertain and weigh the qualifications of the various men available for the position.

This is unquestionably a powerful argument against popular election.

Voters are notoriously remiss in weighing the qualifications of candidates for office, and recent studies seem to indicate that candidates for Public Service Commissions are no exception to the rule. This argument, however, assumes that the appointing official will act intelligently and sufficiently free from political considerations to guarantee a wise selection. This is likely to be the case so long as the governor of the state concerned is the appointing official.

It is possible that any tendency for appointing officials to make unwise selections may be mitigated somewhat by the insertion in public utility laws of appropriate general qualifications for Commissioners, such as, the appointees must be versed in public utility economics, etc. In the early days of public utility regulation no body of men outside of the public utility field acquainted with the problems of such businesses existed. Naturally, the training of the men in this field had not been such as to render them capable of functioning efficiently as Public Service Commissioners. It was necessary, therefore, to equip the Commissions in many cases with men who possessed little or no intimate knowledge of the complicated businesses, which they were supposed to regulate. Regulation, however, has gradually developed a large group of men both versed in the intricacies of public utility operation and possessing the psychology necessary for successful Commissioners. These men should be excellent raw material for commissionerships and a legal provision compelling the selection of one or more of the members of each Commission from this group would seem to be eminently practicable.

THE most common argument advanced by those in favor of popular election of Public Service Commissioners is that it is necessary to protect the public from unfair deci-

Advocates of the Election-Method of Creating State Commissioners Contend—

(1) That appointments are less likely to be made on the grounds of fitness for office as on the grounds of political favor:

(2) That appointees as State Commissioners are more likely to be influenced in their decisions by the public utility interests.

sions engineered by the public utility managements. By the term "public" they presumably mean the consumers of public utility services and those who are exposed to personal or pecuniary injury from their operating equipment.

This argument assumes, in the first place, that a Commissioner appointed by an elected official is more apt to be influenced in his decisions than those elected directly. It is quite probable that from the standpoint of political mechanics it is easier for the managers of public utility enterprises to control the decisions of appointed than elected Commissioners. In the former case all that need be done is to bring sufficient pressure to bear on the appointing official.

To control elected Commissioners, on the other hand, an intricate electoral machinery must be manipulated, a consideration involving in addition to the expenditure of considerable sums of money, the control of human conduct in accordance with principles difficult both of discernment and application.

THOUGH it may be mechanically easier to influence the decisions of appointed than elected Commissioners, it does not necessarily follow that satisfactory results can be more easily attained. For, results will depend not only upon the relative ease of operating the mechanism involved in influencing decisions under the two methods of selecting Commissioners, but also upon the political capacity of the electorate as compared with the social ideals of an available appointing official.

In cases where the former is low in comparison with the latter, those who desire to influence the decisions of Public Service Commissions are more likely to attain their objective under popular election than appointment, in spite of the fact that the mechanism involved in securing this result is much more difficult of operation.

WHILE both the political capacity of the electors and the character of the electoral machinery in the United States are probably far superior to what they were in the past, no evidence exists that they cannot be manipulated by designing groups with a reasonable degree of success. On the other hand, the office of governor, the holder of which is the usual appointing official (and properly so),

possesses at the present time such a "flavor" of respectability, that even a weak man hesitates about using it for personal ends. This hesitation is intensified by the fear of losing political favor if he does so. The incumbents of most state offices may prostitute their positions without seriously endangering their political future. This, however, is not so of the governorship, for upon it all eyes are centered, a consideration rendering a mis-step easily detected and in such an event politically fatal.

Furthermore, whatever may have been the case in the past, it is quite probable that in so far as the future is concerned, utility managements will hesitate more about bringing pressure on appointing officials for selfish ends than about manipulating the electorate. This is because in the former case methods such as personal or pecuniary favors have to be used. These, however, are coming to be frowned upon socially, to such an extent as to cause serious embarrassment to public utilities using them. An unfavorable public reaction does not have to be feared so much in the latter case since the desired results can be secured by working through the legally constituted electoral machinery which any group has a right to use. It is likely, also, that favors secured by manipulating the electorate will be more permanent than those attained by exerting pressure on a weak appointing official.

THE argument that it is easier for utility managements to influence the decisions of appointed than elected Commissions assumes, in the second place, that the public when given control of Public Service Commissions through popular election will not use this control to secure decisions which sacrifice the interests of the investors in public utility securities. There is no evidence at the present time that the public, as defined above, possess any keener sense of social justice than the owners of public utility securities and their representative managers. Even though this were so, the ignorance of the public of the technique of public utility operation is apt to induce it to unintentionally demand from Commissions under its control decisions compelling an unjust pecuniary sacrifice on the part of the investors in these industries.

Furthermore, in every state there are designing parties who find it advantageous to encourage the public in such demands. The possibility of popular election resulting in a sacrifice of the pecuniary interests of public utility investors assumes the aspect of a social menace when we recall that public utilities are socially necessary industries and that their managerial and operating technique is such that a sacrifice of investors' interests may be reflected in poor service and a low level of wages.

ON the whole, it would seem fair to conclude that the method of appointing Public Service Commissioners is likely to function more successfully in most states than that of popular election. It should be borne in mind in this connection, however, that neither method will attain its ultimate potentialities unless the Commissioners are guaranteed a reasonably long term of office and salaries commensurate with their responsibili-

ties. As these stand today, many good men will not seek the commissionership, even though they are not averse to entering the political arena. Nor can even responsible and omniscient appointing officials persuade eligible possibilities in many cases to accept the position.

This attitude is not difficult to explain. Few men can afford to give up a certain position for an uncertain one and this is especially so if the income to be derived therefrom is too small to offset this uncertainty.

Furthermore, if the tenure of office of Public Service Commissioners is reasonably long and their salaries adequate, there is less likelihood that sufficient pressure can be brought to bear upon them to hand down decisions favoring unduly either the public or the public utilities. Experience discloses that unpopular decisions are soon forgotten or, if this does not occur, much of the antagonism arising therefrom is mitigated by popular decisions. Hence, the longer the tenure of office of Commissioners, the less the temptation for them to render decisions with an "eye" to their influence upon the interested parties. Similarly, adequate salaries tend to attract men of high moral character and lessen thereby the opportunities of using the personal favor method of influencing Commission decisions.

The Legal Phrase "Convenience and Necessity" Cannot Be Split in Two

(A statement by Commissioner Fay Harding of North Dakota, in reviewing an application for a certificate by a transportation company)

"In considering the terms 'convenience and necessity' we are of the opinion that they cannot be separated and the word 'necessity' be given a strict construction. Strictly speaking, the electric street car line is not a public necessity. People walked or rode in horse-drawn vehicles before electric cars were known. They could do so again if required. Had a regulatory commission been in existence from which the street car lines were required to obtain a certificate of convenience and necessity, it should have been denied because people could ride in horse-drawn stages. It was not the intent of the law to stop all progress by denying opportunities to new forms of transportation, merely for the purpose of protecting investments made in existing forms of transportation mediums. We are speaking merely for the purpose of illustration. The phrase 'convenience and necessity' as used in the law is not to be split in two."

PUBLIC UTILITIES FORTNIGHTLY
MUNSEY BUILDING ✣ WASHINGTON, D. C.

February 20, 1930.

Subject: The Supreme Court on Annual Depreciation.

Dear Sir:

The Supreme Court has just hung up a new problem in the offices of State Public Service Commissions and public utility accountants. In the Baltimore Street Railway Fare Case the court holds that the annual depreciation allowance must be set up so as to return to the companies the value of worn-out property and not its cost.

That is by all odds the outstanding legal point in the decision because it is new.

The annual depreciation problem at best is not a soft nut that can be cracked between the fingers. Now its shell has been made harder and tougher by the court's decision.

If the depreciation goal and the time element, that is to say, the life of the plant, were both fixed and certain, figuring the annual depreciation charge would be easy enough. When the aim of the charge is to pay back to the stockholders the amount of their investment by the end of the plant's life, the depreciation goal is fixed and visible but the time within which the amount must be repaid is not known.

That is what makes the nut hard to crack.

When the depreciation charge must be set up so as to return to the stockholders the value of the worn-out property rather than the investment, both the depreciation goal and the time element are speculative.

That, of course, will make the nut still harder to crack.

Among our picnic amusements is a contest known as the "time race." The distance to the finishing line is known but the time allowed for the race is not divulged. The winner is the one who is nearest the finishing line when the time expires. The problem of the participants in this race, therefore, is to guess at the time allowance and to govern their pace toward the goal accordingly.

This is something like the problem of fixing the amount of annual depreciation on the cost or investment basis.

Now suppose in the time race the location of the goal itself were not known. The contestants would then have to guess at both the time limit and the location of the goal or finishing line.

That would be something like the problem of fixing depreciation on the value basis.

In other words, to the perplexities which cluster around the depreciation problem on the investment basis is added another difficulty in the shape of an invisible moving target.

The decision of the Supreme Court, however, is a logical corollary of the value theory. It clearly indicates that the court does not intend to recede a single inch from the position it has taken on the main issue as to the basis of the return.

If the Commissions and accountants can crack the nut by fixing an annual depreciation charge which will approximately return the value of the worn-out plant, this will give the utilities the full benefit of rising values and the ratepayers the full benefit of falling values.

Basing the return on value and the annual depreciation on investment, which has been the usual practice, tends to equalize the advantages and disadvantages of rising and falling values.

Yours very truly,

Henry C. Spurr

HCS:S

The Power of Public Opinion

What It Means to the Gas Utilities

With the introduction of electricity for lighting purposes, the gas industry practically collapsed over night and the gas utilities faced bankruptcy. How it educated the public to the use of its product for other than illuminating purposes and reared a new and greater structure on the ruins of the old, was—and is—a *tour de force* in its public relations activities.

By ROGER W. BABSON

It was not so many years ago that we used to go up to the hardware store at the corner and come back with one of those fragile Welsbach mantles, as they were called, which had to be precariously attached to our gas jets and then lighted in order to get a clear and satisfactory illumination. The least blow in lighting these delicate articles would shatter the whole affair, with the result that we had to be extremely careful to guard against clumsiness.

Then came the invasion of electricity for illuminating purposes and almost over night the gas industry found itself defeated on all fronts as far as lighting was concerned.

In other words, a tremendous industry faced bankruptcy as a result of the successful invasion of its field by another public utility.

Did the gas industry sit quietly back and accept defeat?

It did not.

Although the gas manufacturers had lost one of their most important markets, they immediately began investigating new uses for gas and opening up new avenues for the disposal of their product. One difficult part of the task was to convince the public that gas was not an outworn fuel. When it ceased to function for illumination, the mental attitude on the part of the average citizen was that gas had taken its place in history and now belonged to the tallow candle and the oil lamps, to those progressive steps in man's advance in material comforts and civilization.

Today with electricity as a main source of illumination throughout the country, the use of gas has switched into commercial channels so that now there is a 92 per cent heating load in the industry, as compared with a 90 per cent lighting load only a few years ago.

Meanwhile, gas consumption continues to increase steadily with each succeeding year surpassing its predecessor. Furthermore, the industry has only scratched the surface of commercial possibilities inasmuch as estimates show that at the present time

gas is supplying hardly more than 2 per cent of the country's total heating requirements. How far this can be extended fundamentally depends on the problem which is the subject of my article; namely, the manner in which the industry can continue to increase its successful contact with the public.

As the result of an organized campaign, the gas industry soon convinced the public that there were other and better uses for gas than had previously been realized. Consequently, today, the gas industry is in a more healthy state than it ever was before in its history and in many respects it is even better off than many other industries because it has met its crisis and has conquered it. It has stood on the threshold of defeat and it has refused to be relegated to the scrap-heap of industrial progress.

Today gas as a fuel, both for heating and paradoxically enough for refrigerating, is making tremendous strides.

The two factors which have made the gas industry successful are:

(1) research, and,

(2) proper public relations.

As far as research is concerned, I need not go into any details as to its importance. Constant laboratory experiments are being carried on by the gas industry to find new methods of using the commodity and more economical ways of manufacturing and distributing it for the particular uses to which it is being put.

As far as public relations are concerned, there is no question in my mind but that the gas industry is in the forefront of aggressive leadership which has realized that the real basic problem is not competition nor prices but service to the public, and has bent its efforts to selling the public the idea that gas is an imperative necessity in the average household.

We have only to look at such an industry, for example, as coal, to realize how important is the right sort of leadership and the right sort of relations with the public.

The coal industry was established long before gas or electricity was known, yet the coal industry is today shot through and through with dissension, and has seen its markets dissipated simply because it did not have at its helm the guiding force of forward-looking leadership.

Any consideration of the immediate future of the gas industry cannot ignore questions of what will be the effect of the stock market break and lessened business during 1930. In my opinion, the public utilities as a group and certainly the gas industry in that group will not be adversely affected in the way that many other lines will be hurt.

In a business depression, purchasing power is husbanded more thriftily by the public. We have passed through a number of lavish, post-war years, in which prosperity has created a demand for more and more luxuries and nonessentials. Now that the public purse strings are to be tightened as we pass through the inevitable period of reaction which follows every period of prosperity, the public will confine itself more and more to the staple necessities of living and forget the more ephemeral luxuries. Under these circumstances,

The Growth of the Market for Gas Depends Upon the Public Relations Work of the Gas Utilities

"My advice to the gas industry is to push ahead more determinedly than ever and not to let any lessening in general business serve as a signal for timidity along the lines of public relations in which such excellent work has done during the past few years. . . . The cumulative effect of five years' public relations work can drop swiftly from sight if the steady educational drive on the public is abandoned or lessened for even a short length of time."

—Roger W. Babson

it is a time for the gas industry to continue vigorously its campaign for better public relations with the millions of people who are users or potential users of gas.

I personally believe that gas is going to make giant strides in the next few years and my studies of the industry have included both the field of natural gas and the manufactured product.

In my judgment, a large part of the future expansion of the gas industry is going to center not so much around its use for industrial purposes, but rather in the increasing value it will be for general use in the American home.

We are only at a pioneer stage, for example, in heating houses, and we have not even reached that period as far as cooling them is concerned. The day is coming when gas will be a very important factor in keeping our homes at a desired uniform temperature both in summer and in winter. I also look to see gas refrigeration develop tremendously during the next few years.

Here are a few pertinent points about the industry which will give the average reader a good picture of its importance and will show why the industry needs to develop its public relations work steadily and increasingly. Gas is a basic industry because:

1. It serves almost 17,000,000 customers.
2. It has a capital investment of approximately $5,000,000,000.
3. It is, next to electric light and power, the greatest unit of the public utility industry.
4. It is the seventh largest American industry in point of capital investment.
5. It has increased its consumption 100 per cent in ten years.
6. It has expanded its number of customers by 50 per cent in the same period.
7. It has enjoyed a 70 per cent rise in revenue during the past decade.

In my initial article of this series,* I dwelt at length upon the value

* See Public Utilities Fortnightly, January 23, 1930.

of customer ownership in the development of public utilities. I want to stress this factor again in so far as the gas industry is concerned.

The stock market break of last October had of course a temporary and discouraging effect on the selling of stock generally. But there is no reason why customer ownership should not forge ahead more strongly than ever to the mutual benefit of both the company and the customer. In fact, I look upon customer ownership as one of the strongest links in the development of the industry over the next ten years.

I am also a strong believer in the form of regional advertising which the gas industry has been carrying on and which has come particularly to my attention in connection with the activities of the New England Gas Association. Such advertising is bound to help every local gas company, where it might be different if the product was not in the field of public utilities.

For example, it would be futile advertising, as far as the individual companies are concerned, for a group of radio manufacturers to pool their efforts together, simply advertising the value of the radio without mentioning any specific make. On the other hand, what the customer of gas wants to know is, for example, the value of a household incinerator. If he is sold on the idea, he will naturally turn to his local company for the article itself, and, of course, later for the servicing of it.

IN 1930, therefore, my advice to the gas industry is to push ahead more determinedly than ever and not to let any lessening in general business serve as a signal for timidity along the lines of public relations in which such excellent work has been done during the past few years. Many industries and companies do not realize that tremendous ground is lost with the public by retrenching on publicity and advertising during a lean period. Reductions and curtailments must, of course, be made at such times, but it must be remembered that the cumulative effect of five years' public relations work can drop swiftly from sight if the steady educational drive on the public is abandoned or lessened for even a short length of time.

My message to the industry is to continue to hit the line hard as it has been doing so magnificently in the past.

And my forecast is that the gas industry will be further ahead at the end of 1930 than it is today, regardless of how general business may go.

"THE street car is a public vehicle, run for the convenience of the general public. A public carriage for the general public convenience requires each individual to yield some of his separate individual convenience. In the nature of the business, if the public vehicle were run to suit each individual, for his separate convenience, it would be absolutely useless in serving the general convenience." —P. S. ARKWRIGHT

The Right to Repel Raids on Private Records

ALONG with the visitation of the American home by prohibition agents has come a visitation of the American business office by representatives of various investigating commissions. The resultant conflicts between citizens and government agents are raising legal issues which the courts are being called upon to decide. Where can and should the line be drawn between "unreasonable search and seizure" (as specified in the Constitution), and "reasonable" search—specifically in the case of such quasi-public enterprises as the utilities? At what point does the law step in to protect the citizen and the corporation from intrusion?

BY HENRY C. SPURR

"Unless large corporations stop sabotaging legitimate Federal investigating . . . they will unwittingly force government ownership of public utilities as the only way out." [1]

THE incident referred to in the above newspaper item was the refusal of the Electric Bond & Share Company to disclose certain information demanded by the Federal Trade Commission.

It is not necessary here to consider the merits of this dispute. It is sufficient to state that there was a difference of opinion between the members of the Commission and the officers of the corporation as to the right of the government to the information. The matter was taken to a Federal court which upheld the corporation.

In spite of that decision the editor characterizes the action of the company as "sabotage." A reader of the newspaper in which this editorial appeared has asked how the company could be guilty of sabotage when a court has declared that the company had the right to withhold the information.

The fact that a court sustained the company and not the Federal Trade Commission would not entirely dispose of the editor's argument. The editor is evidently proceeding on broad general principles. It is the fundamental impropriety of the refusal of which he complains, and the fact that the court blocked the commission would probably, in his opinion, only make the court a *particeps criminis*. The subject will, therefore, have to be considered from this broad fundamental standpoint.

THE term "sabotage" is of comparatively recent origin. It grew out of labor troubles. It means malicious waste or destruction of an employer's property, or injury to his interests by workmen during labor troubles. The editor has used the term, of course, in a figurative sense, as an epithet to brand certain corporate action of which he disapproves. He

[1] Editorial in newspaper unfriendly to utilities.

means to imply that refusal to disclose information to a legitimate governmental investigating body is a malicious, reprehensible act.

This conclusion rests upon the major premise that every person who refuses to furnish information demanded by a legitimate governmental investigating body is guilty of sabotage, no matter what any court may say to the contrary.

The editor who stigmatizes as sabotage the refusal to furnish information to a legitimate governmental investigating agency would, however, probably be the first to repudiate it if applied to himself or to any of his reporters.

UNDER the date of December 12, 1929, the following despatch was sent over the wires to newspapers:

> "Citizens of Washington have paid tribute to three reporters of the Washington *Times* who served a jail term for contempt of court in upholding the freedom of the press and the ethics of the newspaper profession.
>
> "At a mass meeting which filled to the doors the large Belasco Theater, the three reporters were cheered to the echo when at the climax of the rousing demonstration they were introduced.
>
> "The trio, Linton Burkett, Gorman Hendricks, and John E. Nevin, Jr., were released yesterday after serving forty days.
>
> "As Representative La Guardia of New York declared, in a brilliant address, they were sentenced to jail for 'telling the truth.'
>
> "The reporters exposed a startling array of bootleg activities and prohibition law violations in the Nation's capital in a series of articles in the *Times*, one of the twenty-eight Hearst newspapers.
>
> "Then, hailed before the grand jury to give personal testimony, they refused to turn prosecuting witnesses, with the result that Justice Peyton Gordon adjudged them in contempt of court.
>
> "Colonel Frank Knox, general manager of the Hearst newspapers, introduced them to the audience after ringing speeches in support of their action had been delivered.
>
> "In behalf of William Randolph Hearst and the Hearst newspapers, Colonel Knox presented each of the reporters a check for $1,000 and a gold watch, as a token of 'recognition of the debt which the newspaper profession owes them.'"

Before presenting the watches Colonel Knox said:

> "I believe I state the sentiments of all of the editors in America when I express unbounded admiration for the high courage of these three young men, who kept the faith, preserved the honor of their profession, and suffered hardships rather than be false to the traditions, ethics, and standards of their profession.
>
> "It gives me pleasure to pay tribute to them for taking their medicine in the face of the court sentence which would deprive them of their liberties. The course followed by these reporters was more of a public service than sentencing them."

LET us not be diverted, at this point, to a consideration of the merits of the question whether a newspaper's interpretation of freedom of the press and newspaper ethics are superior to the law of the land. We are considering merely the question whether refusal to divulge information to a legitimate governmental investigating agency is sabotage *per se*.

Manifestly, a grand jury is a legitimate governmental investigating body. Its origin is ancient; its pedigree is beyond reproach. Its importance as an investigating agency of the government far transcends that of the Federal Trade Commission, and this can be said without any intention of disparaging the character of that Commission.

It appears, then, that a grand jury —a very important as well as legitimate governmental investigating agency—demanded information in

possession of these reporters. Rather than give it, they went to jail. If, in doing this, they performed a public service which entitled them to be hailed as heroes and to receive gold watches and thousand dollar checks, then it must follow that not every person who refuses to divulge information to a legitimate governmental investigating agency is guilty of sabotage.

The only basis for the refusal of the reporters to furnish information which the grand jury had the right to have was that it would be in derogation of freedom of the press and contrary to newspaper ethics.

SUPPOSE in the case of the electrical company in question, the court, instead of ruling that the Federal Trade Commission had no power to demand the information asked for, had held that the Commission had the right to demand it. Assume that the company officers had then refused to furnish the information on the ground that to disclose it would interfere with "freedom of contract" and would be contrary to "holding company ethics." Say that this refusal had landed the company's officers in jail. We would then have a situation similar to that in which the reporters found themselves.

Would the editor, in that event, have hailed the corporation officers as keepers of the faith? You know very well that would have been about the last thing he would have done. It would be more reasonable to think that he would have suggested that they be tarred and feathered.

But if conscientious objections to disclosing information are good in one case, why not in the other?

If conscientious objections are good *as against the law,* why are they not good if *in conformity with the law?*

If the person questioned is the sole judge of the propriety of the disclosure in the one case, why not in the other?

IF the major premise upon which the sabotage conclusion is based, namely, that every person who refuses information demanded by a legitimate governmental investigating agency is guilty of sabotage, is sound, the newspaper reporters, as well as the corporation officers, were guilty of that offense. The mere statement of the premise upon which the conclusion rests, however, exposes the weakness of the argument. In that argument we meet with an old acquaintance known as *argumentum ad populum*—the appeal to the feelings, passions, and prejudices of the group addressed instead of to the intellect.

EDMUND Burke, in answering certain revolutionary doctrines, once said:

> "A few years ago I should be ashamed to overload a matter so capable of supporting itself by the then unnecessary support of any argument; but this seditious unconstitutional doctrine is now publicly taught, avowed, and printed."

That was his apology for answering it.

Were this newspaper's subtle assault upon the right of individuals to appeal to the courts against what they believe to be an aggression of the government an isolated case, it would perhaps not be worth noticing. But it is not.

The Laws Protect the Liberty of a Citizen from Invasion by Government Agents

"THE degree to which the liberty of a citizen may be invaded by the government does not make the invasion any the less wrong in principle. The laws of the land establish the limits of governmental power. Once those limits are passed even by the fraction of an inch, the right of the people to lawful resistance through an appeal to the courts exists. The humblest citizen may take advantage of it. If this is defiance of the government, then the right to show that kind of defiance is among the most sacred of the liberties of the people."

OTHER newspapers of a certain group have referred to the refusal of the company to open its accounts to the Federal Trade Commission until ordered by the court to do so as a "defiance" of the government.

An act of defiance may be regarded in different ways. When Patrick Henry stood up and thundered: "If that be treason, make the most of it," it was an act of defiance; but whether it would be regarded as insolent or as a bold stroke against a threatened wrong, would depend on the point of view.

When a newspaper, disapproving the act of the company in refusing the commission's demand for certain information and its appeal for protection to the court, refers to the act as "defiant," it, of course, means that the company pursued an insolent course.

THESE illustrations are typical of a type of propaganda carried on by a group of persons intent on getting what they want at all costs. To them constitutions, laws, and liberties of the individual, secured only after years of hardship and struggle, mean nothing, if those constitutions, laws, and liberties happen to stand in the way of what these persons are after. They are preaching their doctrines in all parts of the country and apparently gaining some prominent adherents. That is sufficient reason for the discussion of assertions which would otherwise seem to be so absurd, un-English, and un-American on their face as to require no reply.

The idea that a person who appeals to a court to establish, if possible, an asserted right or liberty is guilty of sabotage or insolence must be based on the ground that governmental investigating bodies never exceed their powers; that they never seek to trespass upon the liberties of the people; that they are never in error.

The supposition that the government—that is to say, the group of individuals acting in the name of the government at a given time—can never be wrong, or that they will never seek to extend their powers beyond lawful limits, is contrary to all history and experience. The tendency

of one group to encroach upon the liberties of others is always present.

> "The disposition of mankind, whether as rulers or as fellow citizens, to impose their own opinions and inclinations as a rule of conduct on others, is so energetically supported by some of the best and by some of the worst feelings incident to human nature, that it is hardly ever kept under restraint by anything but want of power; and as the power is not declining, but growing, unless a strong barrier of moral conviction can be raised against the mischief, we must expect, in the present circumstances of the world, to see it increase." [2]

DIVINE right and passive obedience are the most slavish and horrible of all doctrines, said Blackstone. The right of resistance against unlawful authority is regarded in England as a fundamental principle of law. Legal insurrection was, for a long period, the only protective measure against the arbitrary acts of the sovereigns, especially the Tudors.[3]

There was a time in England when apostasy was high treason. Religious liberty could never have been gained on the theory that the government never exceeds its proper functions.

The right of personal security, the right of personal liberty, and the right of private property were not handed to the people voluntarily by those acting in the name of the government. They were secured by resistance to what was regarded as unlawful interference with the just rights and privileges of the people. King John would never have kept his appointment at Runnymede if he could have helped it.

[2] John Stuart Mills on Liberty.
[3] The English Constitution, by Dr. Edward Fischel.

WHEN the Federal Constitution was adopted, the powers of the government were split into three parts, the legislative, the executive, and the judicial. Only limited powers were given to each department. It was intended that one department should not usurp powers granted to another department. So the President cannot repeal an act of Congress, nor can Congress be the sole judge of whether it is acting within the limits of its power; nor can the courts perform an act, like the fixing of utility rates, which is solely within the power of the legislature.

The setting up of these limitations to the powers of the different departments of the government is sufficient evidence that the framers of the Constitution were familiar enough with the tendency of one group to encroach upon the liberties of another group.

But the original Constitution was not considered a sufficient protection of the people and the states against the possible usurpation of powers by those in control of the Federal Government.

Ten amendments were submitted by the first Congress to the states. The amendments were duly ratified and became a part of the Constitution. They were designed, among other things, to secure freedom of religion, freedom of speech, freedom of the press, the right of peaceable assembly, and the right of petition to the government. The Fourth Amendment provided:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall is-

sue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

THE fear must have prevailed that those in control of the government might infringe upon the liberties it was sought to preserve. The framers of the Constitution were more familiar with dangers of this kind than some of our present statesmen appear to be. The memory, for example, of the nature of unreasonable searches was still fresh when the Fourth Amendment was suggested.

Just before the Revolution the so-called Sugar Act imposed a duty of six pence a gallon on all foreign molasses imported into the colonies. This was practically prohibitive. It, therefore, led to smuggling.

It was for some time the practice for customs officers with no authority except that of their commissions to enter warehouses and even dwelling houses in order to search for contraband goods. The people became indignant. They demanded the issuance of special search warrants.

But the revenue officers were not satisfied with the limited powers of special writs. On their application warrants were issued similar to Writs of Assistance granted by the Court of Exchequer in England. Armed with one of these writs an officer of the customs, or any person employed by him, could ransack any houses he pleased, and the writ which was not returnable could be used again and again for the same purpose. Bare suspicion, without oath, justified its use. Every dwelling house was at the mercy of the government, at the whim of government officials. It was charged that a more odius and powerful instrument had never been framed. James Otis argued in court for five hours against the legality of these writs.

"I do say in the most solemn manner," declared President John Adams, who heard the argument, "that Mr. Otis' oration against Writs of Assistance breathed into this Nation the breath of life."

To guard against any danger of future governmental aggression against the liberties of individuals along this line, the Fourth Amendment was undoubtedly adopted.

JAMES Otis, resisting on behalf of the people what was regarded as an abuse of power in respect to the search of houses by those representing the government, appealed to the courts for protection. He employed the machinery set up by law for that purpose. He was resisting the government, of course, but he was resist-

"FOR *a corporation to appeal to a Federal court, or perhaps to any court, is regarded by some persons as an insolent defiance of the legislative branch of the government. Decisions of the highest court of the land that the legislative branch of the government has sometimes invaded the liberties of citizens guaranteed by the Constitution, have been referred to in terms of fiery bitterness.*"

ing by means provided by law. It was a liberty which every citizen possessed. How then could *he* be considered guilty of sabotage on the theory that he was resisting the government?

Sabotage is generally charged against persons who smash machinery, not against those who employ it for the purpose for which it was constructed.

In what respect did the action of the people for whom James Otis spoke differ in principle from the act of the officers of the electrical company in appealing to the court in resistance of what they believed to be an unlawful demand on the part of the government?

In both cases the belief was the same—that is, that the government was exceeding its authority.

In both cases the question was taken to the courts for decision.

In both cases the right of appeal to the courts was among the fundamental liberties guaranteed to the people.

RESISTANCE to aggression by those in control of the government at a given time may be by means of revolution or by means of the orderly process of law. The only means short of an appeal to arms is by an appeal to the courts and to juries. Judges and juries have, therefore, been correctly styled the strong rock of a nation's liberty.

How does it happen then that an appeal to the courts to determine whether a threatened act is one of governmental usurpation is a malicious, insolent act when the courts are the only means set up by the Constitution for the determination of that question, and the only means by which it can be determined without a disturbance of the peace by resort to arms?

EVIDENCE is not lacking of a disposition on the part of those in control of governments to exercise arbitrary powers of imprisonment at times. Certain limits to the right of arrest have, therefore, had to be set up. The Writ of Habeas Corpus has been provided to protect the people from the exercise of arbitrary powers of arrest. This writ is granted by the courts, and, therefore, cannot be had without an appeal to the courts for its issuance. Is a person who believes that he has been unlawfully shut up malicious or insolent if he asks a court for this writ in order to determine whether or not the officers who have arrested him acted beyond their authority?

RECENTLY the State Department of the Federal Government claimed that an editorial in a certain newspaper was published with a deliberate attempt to interfere with negotiations by the Department with foreign powers. Assume that the State Department had ordered the editor's arrest and that the police force had executed the order. Suppose the Department was in control of arbitrary men who ordered the editor's ears cut off, an assumption which would not have been unreasonable at one period of English history.

If, under such circumstances, the editor appealed to a court for protection; if he asked for the court's ruling on the State Department's power to mutilate his ears, would he be

guilty of a malicious, insolent act in defiance of the government?

The degree to which the liberty of a citizen may be invaded by the government does not make the invasion any the less wrong in principle. The laws of the land establish the limits of governmental power. Once those limits are passed even by the fraction of an inch, the right of the people to lawful resistance through an appeal to the courts exists. The humblest citizen may take advantage of it. If this is defiance of the government, then the right to show that kind of defiance is among the most sacred of the liberties of the people.

IT sometimes happens that one department of the government seeks to infringe on the powers of another department.

Such a case occurred recently in New York state.

Governor Franklin D. Roosevelt claimed that the legislative department sought to exercise powers which belonged exclusively to the executive department. The governor appealed to the courts and the courts upheld him. In thus appealing to the courts for protection against what he thought a usurpation of power by the legislature, was Governor Roosevelt guilty of sabotage? Was his action malicious and insolent?

Suppose a governor should issue a proclamation purporting to set aside the tax laws of the state against public utility companies, and declaring that all utilities should henceforth be exempt from taxation.

Would a person appealing to a court for protection against the governor's usurpation of legislative power, therefore, be malicious and insolent?

THERE has been quite a bit of propaganda to the effect that decisions of the Federal courts have interfered with legislative policies as to the regulation of rates. Those policies are expressed in statutes and in decisions of the State Commissions and the Interstate Commerce Commission. For a corporation to appeal to a Federal court, or perhaps to any court, is regarded by some persons as an insolent defiance of the legislative branch of the government. Decisions of the highest court of the land that the legislative branch of the government has sometimes invaded the liberties of citizens guaranteed by the Constitution, have been referred to in terms of fiery bitterness. Some, if they could, would even take away the right of appeal to the courts—another evidence of the determination of one group to impose its will upon another, in absolute disregard of rights established by years of struggle and sacrifice.

NO more dangerous doctrine could be established than that an appeal to the courts—on the ground that an act of the legislature or any of its agencies is believed to be unlawful—is an insolent act of defiance.

The persons who are guilty of sabotage against the liberties of the people are not those who stand up for those liberties by lawful appeal to the courts, when necessary. If anybody is guilty of sabotage it is persons who, like certain editors, regard such lawful appeals as malicious and insolent. It is they who are trying to smash the machinery.

THE REASONS FOR THE

Decline of the Municipal Plant

THE municipally-owned electric plant began its steady rise in 1882, reached its peak in 1923—and then began a rapid fall. The causes of this change have, for several years, been the special study of Professor Dorau. In this article the author summarizes the efforts which are being made to reveal the underlying facts, to serve as the basis of sound and unbiased opinion.

By HERBERT B. DORAU
ASSOCIATE PROFESSOR OF ECONOMICS, NORTHWESTERN UNIVERSITY SCHOOL OF COMMERCE

MUNICIPAL ownership in the electric industry has, from the earliest history of this utility, been a subject of interest and much controversy. More than that, the publicly-owned portion of the industry has from the beginning been an important division of the electric light and power industry.

Few people probably are aware that close to 4,000 communities in this country have at one time or another been served by a publicly-owned electric light and power establishment.

THE literature of municipal ownership is largely concerned with "the arguments for and against" generally presented with the fervor of a "cause."

It was not with any intention or desire of adding to an already substantial literature of this type that The Institute for Research in Land and Public Utility Economics recently issued the first of a series of studies [1] of municipal ownership in the electric industry of this country. The purpose in these studies is to develop basic facts about municipal ownership in the large. The hope is entertained that these, by their lack of concern for the merits of municipal ownership as such, will, however, by concentrating attention on elemental economic and technical fact, create some interest in *understanding* trends in municipal ownership and thus make *opinionation* on this subject more reasonable.

PROCEEDING upon the assumption that municipal ownership in the large is an explainable phenomenon, the method of analysis adopted was to ascertain as many as possible statistically presentable, simple, and indisputable facts about municipal ownership. Answers to such elementary questions as where municipal ownership developed, how and under what circumstances, and when, it is believed, will contribute materially to an understanding of why there is municipal ownership in the electric industry.

The briefest possible answer to

[1] "The Changing Character and Extent of Municipal Ownership in the Electric Light and Power Industry," published by The Institute for Research in Land and Public Utility Economics, 337 E. Chicago Ave., Chicago.

even these simple questions developed into a substantial volume. Only a few leading trends can be indicated in the space here available.

FROM 1882 to 1922 municipal ownership of electric establishments increased consistently, and from 1909 to 1922 rapidly, reaching its peak in 1923 with a total of 3,066 instances.

The very rapid increase of municipally-owned electric establishments from 1912 to 1922 suddenly ended in 1923 and a decline set in which was all but precipitous.

In the five years from 1922 to 1927, 1,020 municipally-owned establishments changed to private ownership. The decrease in the number of municipally-owned establishments in the four years 1924 to 1928 brought the number in existence back to the level of 1916—a loss in four years equal to the gain of the previous eight years.

Up to 1923, 85 per cent of all municipal electric plants ever established were still publicly-owned and operated. The sudden turn in the four years, 1924 to 1928, made such inroads on the municipally-owned establishments that only 60.8 per cent of all ever established were still municipally owned at the beginning of 1928.

IN this matter of the stability or persistence of municipal ownership wide differences are exhibited by the various geographic divisions. In 1927, the East South Central states retained only one out of three municipal electric undertakings ever established while New England, in sharp contrast, still reports under municipal ownership 91.3 per cent of all that were ever publicly owned.

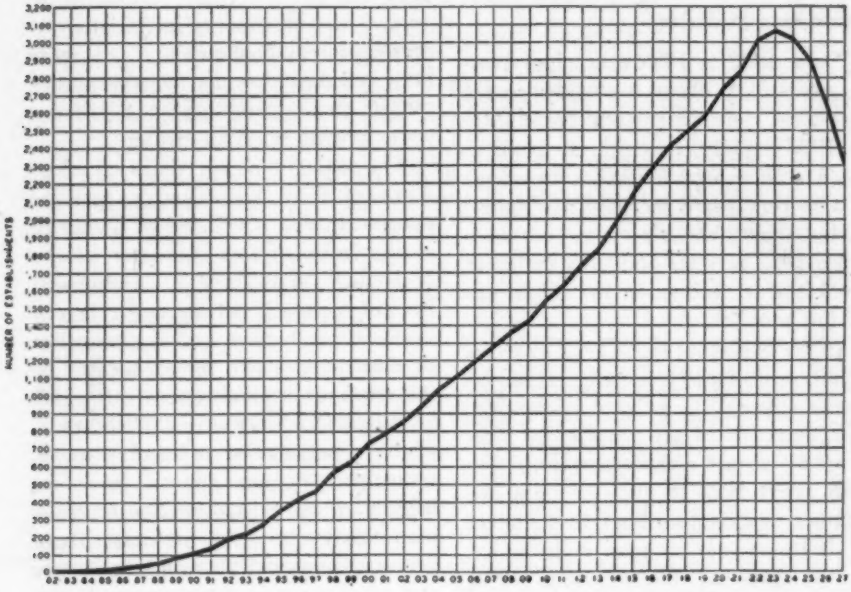
It is significant that approximately four out of every five municipally-owned establishments originated as municipal establishments, *i. e.*, were built and developed by the community rather than being purchased from some private previous owner.

The shift in recent years of large numbers from municipal to private ownership was paralleled by a change in the technological character of the municipal establishment. Influenced by the technical advances of recent years in production and transmission of electricity which have operated to the relative disadvantage of all small and isolated electric establishments, whether publicly or privately-owned, municipally-owned plants have in large numbers ceased generating their own needs and now purchase from private companies serving large areas and producing in large central stations.

At first the trend toward high line construction and distance transmission (1912 to 1918) appears actually to have stimulated the increase in municipally-owned establishments. The power companies needed their capital for central stations and principal high lines. Demands for expansion in the larger communities which they already served added to the high cost of capital, and for a time the practical impossibility of getting capital lessened their interest in building or acquiring small town distribution systems.

IN 1922, 60 per cent of the municipal establishments were self-sufficient, *i. e.*, generated the electricity which they distributed; in 1927 al-

NUMBER OF MUNICIPALLY OWNED ELECTRIC LIGHT AND POWER ESTABLISHMENTS IN EXISTENCE AT THE END OF EACH YEAR
1882 - 1927



THE RISE AND DECLINE OF THE MUNICIPAL POWER STATION

The number of city owned plants reached its peak in 1923. Since that date the cities have been selling their electric plants to private corporations—for various reasons which are here outlined.

most 60 per cent were purchasing from private power companies.

In some sections of the United States this technological revolution has almost been completed; in others is just well under way. The statistics of the study afford some basis for believing that where and when the municipally-owned portion of the industry has adjusted itself to the new technology by purchasing, instead of generating, it has developed more resistance against the tendency to change to private ownership. A substantial number of one-time municipal establishments have gone through an interesting cycle step by step from a condition of self-sufficiency, to purchasing part of their needs, to purchasing all and then, after a time, the sale of the distribution system to the privately owned power company.

THE average municipally-owned establishment which by 1928 had changed to private ownership had been in existence 11.7 years. Out of the 1494 municipal efforts which by 1928 had culminated in private ownership, 25 per cent lasted five years or less. In general the more recent the date of origin of a municipal plant the greater the probability of its changing to private ownership.

MUNICIPAL ownership in the electric industry is principally a small town phenomenon. Out of the 3,814 cases recorded 29 per cent originated in communities with populations of less than 500, 55 per cent in communities having less than 1,000 population, 70 per cent in communities with less than 1,500 population, and 80 per cent in communities with less than 2,000 population.

That the decline in the extent and the change in the character of municipal ownership in the United States is largely a by-product of the technological changes in the electric industry is an almost unavoidable conclusion. Similarly, if one cause is to be singled out for the rapid increase in municipally-owned establishments from 1910 to 1920, the application of the Diesel engine to electric generation must be recognized as a technical factor favoring isolated production of electricity.

No single explanation for such a large scale widespread phenomenon as municipal ownership of electric establishments can be offered. Many factors having widely different origins and settings must be studied.

Those factors which are receiving special study and attention may be classified into four groups: (1) legal and political factors; (2) technological factors; (3) economic factors; and (4) the causes to be found in the successive changes in the philosophy of the people at large with respect to the desirable extent of governmental conduct of essential services.

AMONG the legal and political factors which have affected the development of municipal ownership, the extent and success of the policy of regulating privately-owned enterprises is, no doubt, of first importance. In some states, especially in the earlier years, municipalities lacked authority to engage in the electric business and this hindered a rapid development of public undertakings. On the other hand, the rapidity with which municipal establishments have been changing to private ownership in recent years was affected by the ease with which a community could dispose of its establishment, if it so desired.

The Outstanding Causes of the Present Trends in the Municipal Ownership Field:

(1) The legal and political factors;

(2) The technological factors;

(3) The economic factors;

(4) The causes to be found in the successive changes in the philosophy of the people at large with respect to the desirable extent of government conduct of essential services.

Along with the changes in technology came changes in economic conditions which also affected the extent of municipal ownership in the electric industry. One of the outstanding economic changes has been the great improvement in the borrowing power of private electric corporations. With the decline in the cost of capital it has been possible to finance acquisitions of municipally or privately-owned isolated establishments and interconnect them, on a basis which offered opportunities for profit.

But not only did the "buyers'" capacity and willingness to buy municipal establishments rise distinctly after 1920 but the municipal "owners'" desire and willingness to sell had also increased. Many communities needed or thought they needed other things more than a municipally-owned electric establishment. Their wants were for paved street, new schools, war memorials, municipal buildings, and auditoriums, but with no increases in taxes or in the bonded debt. Not infrequently large added investments would soon be needed in the water and electric establishments because of the larger demands for service or the needed replacement of worn out or obsolete or otherwise impaired equipment.

That during the years following 1923 an ever-increasing number of buyers' and sellers' minds should meet seems almost a foregone conclusion when the circumstances are understood.

How One City Is Improving Traffic Conditions

In Baltimore last summer the street railway company induced truck owners to join in a campaign to keep trucks off the street car tracks and so speed up the cars. Truck owning companies—including freight vans, department store and other delivery vehicles, bakeries, and laundries, notified their drivers that street car motormen had been requested to report all unnecessary blocking of street cars, and that the purpose was to provide speedier travel for the customers of those concerns, who rode the street cars.

Public sentiment was brought into play, and only a few reports of recalcitrant truck men had to be made until the situation showed marked improvement. Coal dealers, feeling the public sentiment, are now clamoring to get on the band-wagon, according to a Baltimore dispatch, and declare their willingness to keep trucks off tracks to give car riders the right of way. One dealer now makes no deliveries during peak hours of street travel—6 to 9 A. M. and 4 to 6 P. M.

The railway reciprocates by publishing the names of the companies co-operating with them in speeding up travel, and the companies get their reward in increased good will from the street car riding public.

Remarkable Remarks

An editorial in the Boston "Herald."

"The great work of developing water-power sites has been pretty well completed."

DONALD R. RICHBERG
Chicago lawyer.

"The ownership and operation of a public utility should be made legally a public trust."

C. J. MILLER KENYON

"Capitalism is a relic of barbarism we haven't the courage to abolish."

ED HOWE
Philosopher and journalist.

"The real New Woman is going into business, instead of into Flapperdom."

MAJOR GENERAL J. G. HARBORD
Chairman of Board, Radio Corporation of America.

"We must hand on to generations to come something more than efficient machinery and money in the bank."

JUDSON KING
Director, National Popular Government League.

"The power interests have used every known method of influencing the human mind except sky writing."

Order given to a grocer by a hurried commuter.

"Quick! Give me a bag of flour, a half dozen eggs, a pound of butter, and a bottle of milk. I want to make a train."

STEPHEN B. STORY
City Manager, Rochester, New York.

"For every eight persons who vote in this country there is one person in governmental service of some form or other."

MABELLE JENNINGS
Newspaper columnist.

"The nick-name that certain political-minded gents have applied to the White House: the Great Commission House."

HEYWOOD BROUN
Essayist.

"The machine will have come of age (in 1980) and the greater part of industry will consist merely of pressing buttons and pulling gadgets."

An editorial in "The Argonaut."

"Our politicians, undoubtedly, will always seek to control all the public utilities they can secure as they will seek to control every other accessible source of patronage."

HENRY FORD
Automobile manufacturer.

"Profits accruing to the people through the use of power have always been greater than the profits gained by the electrical companies through the production of power."

H. I. PHILLIPS
Newspaper columnist.

"If there's anything I'd like to own in this country it's a good railroad. If you don't think they're doing business you should be unlucky enough to get a room in a hotel near a freight-yard."

News item for Broadway's theatrical weekly "Variety."

"Several of the Florida bus lines operating out of New York are employing hostesses on outgoing trips, with gals getting free transportation, other expenses, and a percentage cut on sales solicited by them."

ROGER W. BABSON
Economist and statistician.

"This $25,500,000,000 investment in plant and equipment (of public utilities) is of far less importance to their future success than the one great asset of public good-will."

WOODROW WILSON
(In an address made in 1915 to the American Electric Railway Association.)

"There is no use inviting suspicion by secretiveness. If a business is being honorably done and successfully done, you ought to be pleased to turn it inside out and let the people whom you are inviting to invest in it see exactly how it is done and with what results."

T. J. SMITH
Editor and publisher of the monthly pamphlet "So the People May Know."

"When the Gas and Electric Trust starts to get control of a city-owned light plant, they usually corrupt city officials. Now and then there is one or two that won't sell out, but the majority love money more than honor, so they vote to sell."

Editorial in the "Los Angeles Times" (in commenting upon the recommendation of the city's Bureau of Power and Light to purchase the privately-owned electric company).

"The plain fact is that the city power bureau, under its present management, simply cannot be trusted with an unregulated monopoly of the business of generating and distributing electricity in this city. The business is too important for that."

ARTHUR BRISBANE
Hearst editorial writer.

"Senator Brookhart wants to 'bar public utility radio stations from the air.' Why not let everybody, corporations included, say what they want to say, according to constitutional provision, assuming that more important matters are not crowded from the ether? The people are not fools, are able to recognize sincerity, and need not tune in, unless they choose."

WHAT IS MEANT BY THE WORD

"Value"—as a Basis for Rates?

The conflict between the courts and the economists that centers about this definition of terms.

By LOUIS L. G. BENEDICT

HERE is an excerpt from the minutes of a recent session of the Commission on Revision of Public Service Law. Dr. Dwight P. Hadley was witness and Professor James C. Bonbright one of the Committee:

> "MR. BONBRIGHT: Doctor, it is extremely difficult to get a court to understand . . . the objection that all economists have to making value a standard of rate making. . . . Am I not right in suggesting that all reputable economists . . . agree that value cannot properly be the basis of rate control?
>
> "THE WITNESS: If you qualify it a little and say that nearly all economists do, because I know some economists who do not agree with me on that point. . . .
>
> "DR. BONBRIGHT: Do you happen to know any economists who hold that value is and can be the basis of rate control, can you name any?
>
> "THE WITNESS: Come to think of it, the only man that I can think of is dead. I guess you win."

IT appears then that the United States Supreme Court, in ruling in a succession of cases that the rate base is value, has established, in the unanimous opinion of the economists, an illogical and impossible rate base.

The writer is a lawyer and not an economist and perhaps his predilections are towards the court rather than towards the economists, but it seems to the writer that the economists have given very little consideration to the subject of value in their discussions of the rate base. They have contented themselves with observing that value depends on earnings and that when it is attempted to fix rates, (that is to say earnings), by allowing a reasonable return on value, there results a vicious circle of reasoning; they say that increasing or diminishing earnings increases or diminishes value, and let it go at that. Consequently, at least some of the economists say that by "value" the courts mean "value for the purpose of rate regulation, which is cost,"—a neat way of reversing the courts' ruling that the rate base is value and not cost. It is as if a real estate owner were approached by a stranger who inquires the value of his house. The owner might ask:

"Do you represent the tax department and are you asking about value for the purpose of taxation, or are you from a commercial agency and

want value for the purpose of giving me a credit rating? Those two kinds of value are very different."

On the contrary, the court, in ruling that the rate base is value, implies that value is a fact which exists, irrespective of the reason for determination, while conceding that it is not capable of exact measurement, but is a matter of judgment.

THE court has ruled, also, that reproduction cost is the dominant element of value, but it has given no reasons for that conclusion, nor, so far as the writer is aware, have any reasons been given in any of the briefs presented to the court, or in any of the numerous articles on valuation for rate making.

It is not necessary to become involved in a vicious circle of reasoning in basing rates on value. To make this clear requires some elementary consideration of the nature of value.

Ask the man in the street what value is. He will ask:

"What kind of value do you mean? Cash value, real value, cost value, market value, forced sale value, or what other kind of value?"

His question implies that he is thinking not of the meaning of "value" unqualified, but of different ways of estimating value. The best definition he can give is that "value is what a thing will sell for," by which he means market value. Market value implies that commodities of like kind are commonly bought and sold. There is no market for public utilities.

Without attempting a definition of value, it is possibly enough to say that it is something that emerges when utility and scarcity coincide.

"UTILITY" may be defined as "capacity to supply any human want," whether that want be good, or frivolous, or evil. The air has enormous utility. We could not live without it; but there is a superabundance of air, to be obtained without effort. Consequently, it has no value. There is a bird on Block Island which is the scarcest bird of that kind, because he is the last of his race, but he has no value because he is good for nothing; (or, at any rate, let me assume he is good for nothing, in case any critic may discover some use for him). Consequently, with great scarcity and no utility, he has no value.

VALUE involves a comparison, but not necessarily a comparison of the desirability of an object with the desirability of some amount of money. We are so familiar with the words: "I would walk a mile for a Camel." In that case, Camels being wholly absent, one of them is worth the effort of walking a mile, or, at least, that is the claim. The comparison of desirability is between satisfaction to be derived from a Camel and satisfaction with not walking a mile.

The Austrian economist, Wieser, gives a good illustration:

A farmer settles his family in a place remote from any neighbor. He draws water from a well which supplies more than he needs. He can draw bucketfuls and pour it on the ground without loss, because there is always more than enough. The water has no value because there is no scarcity. But in the course of time, his household grows. Now his

How the Word "Value" Is Misinterpreted to Thwart the Ruling of the Courts:

"THE economists have given very little consideration to the subject of value in their discussions of the rate base. . . .

"AT least some of the economists say that by 'value' the courts mean 'value for the purpose of rate regulation, which is cost'—a neat way of reversing the courts' ruling that the rate base is value and not cost."

well does not supply all the water needed. He has to obtain an additional supply by drawing water in barrels from a spring half a mile away. Each barrel that he draws is worth the effort of getting it home. If he employs a man to do that work, the value of each barrel of water drawn from the spring may be computed from the cost of conveying it. Inasmuch as one barrel of water is worth as much as any other barrel of water, the water in his well now has a value, per barrel, equal to that drawn from the spring.

ON the west side of Manhattan, there is a subway owned by the city and constructed some years ago. It is much overcrowded. That there is a scarcity of subways appears from the fact that the city has thought it worth while to build a parallel subway. Necessarily, the subway now under construction will be worth at least the cost of construction when completed irrespective of whether the city will or will not receive an adequate financial return upon its investment. The first subway is like the second in all material respects. Consequently, that first subway is worth per mile, as much as the second subway, no matter what was its original cost, just as Wieser's well water becomes worth as much as water drawn from the spring.

In other words, the first subway is worth the cost of reproduction as a minimum. That was what the Supreme Court decided in Smyth *vs.* Ames. It approved the finding of the Nebraska Board of Transportation which gave a value to the railroad equal to cost of reproduction (nothing said about depreciation) no matter what the court said in its famous *dictum* known as "the rule in Smyth *vs.* Ames."

THERE is another subway on the east side of Manhattan, which is not paralleled. If it did not exist, the city would set to work at once to build one like it over substantially the same route. Is its value any the less because the city has not built a parallel subway?

Evidently the least amount which can be said to be its value is to be measured by what it would cost to build another like it, or, as more usually expressed, to build it again if it were not there. In this way, its

minimum value can be established without circular reasoning. Its value may be greater than reproduction cost, but the utilities do not claim a greater amount.

THERE has been much advocacy of a rate base measured by actual cost in some form—original cost, book cost, prudent investment, historical cost—on the ground that actual cost is a stable yard stick, while value, or reproduction cost, is "an educated guess."

But the actual cost basis is one estimated by dollars expended. It is assumed that a dollar is always a dollar and hence a stable measure. A dollar is 25.8 grains of gold 9/10th fine, or 23.22 grains of pure gold, and it makes no difference whether it is coined or not; that amount of gold is a dollar. Gold is a commodity like any other metal, and like other metals, it varies in price. The value of commodities in general is measured by that amount of gold for which they may be exchanged; the value of gold, a particular commodity, is measured by the amount of other commodities for which it may be exchanged. As a yard stick, gold is untrustworthy, much more so than a surveyor's steel tape, which has to be corrected for temperature. So the dollar, as a yard stick, has to be corrected for variations in prices, which is precisely what is done when value is estimated by cost of reproduction rather than dollars of actual cost. Cost of reproduction measures the investment in terms of dollars at their present value. The correction might be made by applying index figures of the Department of Labor to items of book cost if the index figures were classified to show changes in price of the various kinds of units of which plants are composed, but they are not, neither are there any index figures of the price of labor.

THE expression "fair value" is used by the court in its opinion in Smyth *vs.* Ames. In a strict sense, the words do not belong together. Fairness is a matter of ethics, "value" a matter of economics. The utility of an object is not affected by any consideration of fairness; neither is its scarcity, nor the effort or cost to reproduce it. These are the only elements of value and it follows that value is neither increased nor diminished by any consideration of fairness, however such consideration may or ought to affect prices.

SUCH illustrations as have been given of installations of which the minimum value cannot be said to be less than cost of reproduction refer to those which would be reconstructed if they did not exist, but it may be that there are constructions which would not be reproduced because their utility is insufficient to justify the expense. Such are many interurban electric railways which have suffered from the competition of motor cars and busses. Or, it may be that the utility of an installation is so pronounced and competition so retarded or prevented by some monopolistic condition or grant, resulting in an artificial scarcity that its value is greatly in excess of cost of reproduction. In the former case, fares will necessarily have to be fixed on what the traffic will bear, in which case, the value to the owner and the rate base

will work out less than the cost of reproduction; in the latter, the courts will refuse to include in the rate base such elements of value as it would be unfair to the users to include. The court will leave to the owners that part of the entire value which is not less than cost of reproduction, less depreciation, if any, and will leave the remainder of the whole value in the users, who will then receive the services of the installation at a price less than they would rather pay than do without.

The difference between what the users will then pay and what they would rather pay than do without, represents the "consumers' surplus" of the economists.

That part of the whole value on which the owner is entitled to receive a return is the "fair value" of the courts which, however, cannot be less than their cost of reproduction (less depreciation, if any) because that amount measures the original investment, corrected to conform to present prices of materials and labor.

In cutting down actual value to "fair value" the court does not destroy any part of the actual value of the installation. It merely transfers part of that value from the owners to the users.

THE value of an installation does not necessarily depend on the income to be derived from it.

How about the Brooklyn Bridge? The city, in its corporate capacity, owns it but will never sell it nor charge tolls. Has it then no value?

On the contrary, it has a value at least equal to the cost of construction of a bridge of equal capacity, permanence, and beauty. It has no value to the city in its corporate capacity because, by abdicating its right to tolls, it has transferred the entire value to those who use it, or in some way profit from its existence.

The whole subject of confiscation by rate reduction is based on the assumption that value may be taken in part from the owner and transferred to the users.

If the Socialists, through amendment to the Constitution, could prevent public utilities from receiving a greater return than would suffice to pay cost of operations, leaving the owners with the bare shell of unprofitable title, they would have nearly reached their ultimate goal. They might then attain it by state regulation to the extent of state appointment and control of officers and agents.

When it is charged that regulation has broken down, the kernel of the complaint is that there has been a breakdown of efforts to avoid the ruling of the Supreme Court that the rate base is value and not cost.

"POWER customers of electric utilities consume current in such quantities, generally, that they may protect themselves against high rates by installing their own facilities for the generation of current. This fact creates a competitive condition resulting in the electric utility constantly keeping the rate for its current as low as or lower than the power can be produced by the manufacturer."

—From the report of the National Association of Railroad and Utilities Commissioners, 1929.

As Seen from the Side-lines

MR. O'Fallon's railroad just will not keep off the front page. Nine miles long only, but with a thirty billion dollar aura!

* *

NOT since Mr. Daniel Webster argued the Dartmouth College Case and fixed the vested right in property has anything arisen to disturb the eco-political world like the O'Fallon line. What Mrs. O'Leary's cow was to Chicago, O'Fallon's road is to Congress, the United States Supreme Court, and the Interstate Commerce Commission. It has started fires of public regulation, recapture, valuation, reproduction theories, and a handful of incidental issues that will not stay out. Possibly the case can be stated simply, and still be stated right. Let's go:—

* *

WHEN the Esch-Cummins railroad act established the policy that railroads should be allowed to charge rates which would permit them to earn a maximum dividend, it provided that the excess profits should be recaptured and retained by the government. That's a pretty general statement, as critical friends will doubtless remind us. A fair profit is not an excess dividend. A fair profit on what? Why, on the value of the property. The Commission set out to determine the value of the property. As Mr. O'Fallon's road was an inoffensive little one, minding its own business, the Commission decided to appraise it. This done, the same standard of values could be applied to the other roads of the country—the chesty, formidable ones.

* *

SOME folks said the value of the roads was about twenty billions. Others contended that if certain theories of valuation were applied, their value would attain a high-water mark of thirty billions. A difference of ten billions, on which the traveling and shipping public would have to pay increased rates. Mr. O'Fallon's road grew over night from an inconspicuous 9 miles of tracks and ties to a mighty lever which could raise or lower the economic status of America's railroad transportation system, the marvel of the world.

* *

IT seems that the Commission evaluated the O'Fallon line by estimating its value in 1914, adding the cost of property installed subsequent thereto, and subtracting the depreciation of that property. Mr. O'Fallon's case went up to the Supreme Court *pronto* and the court ruled that the Commission failed to consider cost of reproducing a railroad today, at today's prices, the rule fixed by the law which the Commission should have followed. And from that point on, the row begins anew.

* *

THE Commission seems to believe that it, better than the court, knew what the law meant. It actually believes that Congress knew what it meant when it passed the law. But, in order that all doubt shall be removed, the Commission is now plainly telling Congress that it ought to get on the job and fix a theory of valuation of which there shall be no doubt. Congress has the right to prescribe the conditions under which investments can be made in railroad property, the Commission says. Congress is the legislative authority, in other words, the boss; the Commission is its agent in this matter, and the boss should give the agent explicit instructions, clear, understandable. Such is the theme of a letter sent to Congress by the Commission, of which the following are extracts:

* *

"WE believe that it is not only appropriate but highly desirable that Congress should by definite direction to this Commission indicate its views as to how we

should exercise reasonable judgment in arriving both at 'fair value' and 'fair return.'

* *

"THIS is not a question of technical law, but a question of what is just and right. There is, therefore, every reason for a definite declaration of public policy upon this matter in the first instance from the fountain-head of legislative power rather than from a mere agent of Congress, which is what this Commission is."

* *

IN other words, the buck passed right back to Congress.

* *

AND, with what result? With the result that the valuation of the railroads will be delayed for more years to come.

* *

CONGRESSMEN have had a trying and dangerous time with the Esch-Cummins act, notably in the West. The Westerners wild-jackassed about the railroad law ten years ago just as they have done with regard to the tariff bill of today. No sooner did the thought become prevalent that the law guaranteed the railroads a dividend, which it did not, than the folks of the wide-open spaces began to howl. Another evidence of Wall Street influence in Washington, they said. Gypping the freight-payers of the West for benefit of the money moguls of the East. That yowl was made with all sincerity and with great effectiveness. Farm depression was on, banks were collapsing, loans being called, and property going under the hammer. Congress was deaf to the plea for farm relief; it was alert to the cry of the railroad investors of the East. Under that psychology many of the Western representatives went down to defeat, and Senator Cummins, as fine a figure as ever came out of the West, suffered a loss of prestige which he never recaptured.

* *

CONGRESSIONAL elections will be on this fall. Every one in the House and one out of every three in the Senate will be obliged to face his constituents. These gentlemen are wise in the ways of the world. Also, they have the experience of ten years ago still in front of them. Some of them have got enough to explain already in voting for the tariff bill as it passed the House. Backward states, as Mr. Grundy has termed them, are not backward in venting their anger at the polls.

* *

IN appreciation of all this, your Congressman will allow that they have enough to do on the tariff and prohibition without taking up at this time the highly-complicated theories of railroad valuations. Mr. O'Fallon's railroad will slumber on for a time. It will not be putting out its hoof, like Mrs. O'Leary's cow, to upset any kerosene lamps until after the 1930 elections are safely out of the way.

John T. Lambert

Believe It or Not

(By our own Ripley)

ALL employees of the Fifth Avenue Bus Company in New York are members of the Knights of Columbus.

* * *

THIRTY-ONE thousand five hundred people lost their lives during 1929 in motor vehicle accidents in the United States.

* * *

THE total investment of American public utilities is estimated at $25,500,000,000—a sum $8,000,000,000 greater than the national debt of the United States.

* * *

AN electric lamp that can be lighted by a match is operated by a photo-electric cell, sensitized to light, and burns only when a flame or some other light is held underneath it.

What Others Think

Differences of Opinion Mark the Proposals for Merging the Communication Utilities

No question has given rise to livelier discussions than that raised by Owen D. Young, Chairman of the Board of the Radio Corporation of America, in his testimony before the Senate Committee on interstate commerce recently favoring consolidation of radio and telegraph communication interests. One group, opposed to Mr. Young's views, favors government ownership. The other believes that competition is the solution of the problem.

Public ownership is favored by *The Nation*. Upon that point views of this publication have been set forth as follows:

"If private operation means efficiency, why is public regulation necessary? Plainly because under private monopoly the gains of efficiency are likely to go to the owners and not to the public, as we have seen again and again. Notwithstanding all protestations of "service," the companies often gather in millions by exploiting the public instead of serving it. They have consequently a huge financial stake in defeating effective regulation. During the past half century, since we first began trying to regulate the railroads, at every step and with a large measure of success the private companies have fought effective regulation. They are fighting it today with all their enormous financial and legal resources. Surely Mr. Young is not unfamiliar with the record of the power companies during the years just past; surely he does not imagine that they will consent to any legislation that seriously lessens their control over their customers. Pit a great private company with a huge direct financial stake against consumers most of whom have only small sums at issue, and nine times out of ten the company, in one way or another, wins. Mr. Young's plea for private monopoly plus effective regulation, however honestly intended, is in fact, we believe, a plea for private monopoly plus ineffective regulation. That, we submit, is intolerable, and we do not believe that the American people will tolerate it indefinitely.

"They may tolerate it for a good while, however, because they will cling to the hope that Mr. Young and men like him hold out to them and because they are fearful of trusting serious economic tasks to their government. That distrust has abundant historical basis, but the record of private industry is not spotless, nor is that of government enterprise wholly bad. Even our much-berated Federal Government has not made a bad job of the Panama Canal, the Mississippi Barge Canal, or the Alaska Railroad, to choose only three instances. Many of the criticisms urged against government industry lie almost equally against large-scale private business, particularly of a monopoly character. The faults are largely the faults of bigness as such. Public business, by and large, is far more honest than private, and its record for efficiency is much less unfavorable than its critics make out. Government in the past has been largely an agency of repression and order, but today, even in capitalistic states, governments take on increasing economic responsibilities and in so doing change their character and function. We shall probably take Mr. Young's advice, but we shall not learn the full lesson of his testimony until we have learned to perform these great economic tasks through our own agencies instead of turning them over to private individuals to carry on for their own profit. Private monopoly and public advantage, we believe, are fundamentally incompatible, no matter what regulating machinery we devise. In fields where unification is economically desirable, such as Mr. Young points out, we may accomplish some results in trying to reconcile private and public interests by regulation, but we shall reach in the end no solution short of actual government ownership."

Newton Carlton, President of the Western Union Telegraph Company, testifying before the Committee, declared that the British "threat" claim was one of the most fantastic bogies that had ever been dressed up. In testifying before the Committee, Mr. Young advocated that the International Tele-

phone & Telegraph Corporation and his company be allowed to merge and that even the Western Union might be combined in a single radio-cable-communications monopoly to combat the external communications mergers of England and other nations.

Asked by Senator Wheeler about Mr. Young's previous testimony as to the need of a merger, Mr. Carlton said:

> "I consider that some of Mr. Young's statements with respect to communications are in line with the advice he gives to nursing mothers."

CLARENCE H. MACKEY, Chairman of the Board of the Postal Telegraph Cable Corporation, however, in his testimony before the committee, disagreed with Mr. Carlton and supported Mr. Young. He thoroughly disagreed with those who say that the threat of the British merger is fantastic. His testimony in respect to that interesting question was as follows:

> "Until the recent developments of large foreign combinations of cable and radio companies there was no single cable and radio group that had a dominating control of the world's cable mileage. Today Cables and Wireless, Limited, the company formed to carry out the merger of cables and radio systems of the British Empire, in addition to its radio circuits, controls 168,265 nautical miles of submarine cable, or more than 58 per cent of the world's total cable mileage.
>
> "Now that the British merger of its radio and cable facilities has been accomplished, it may be taken as a fact that the British government will stand solidly behind its communication interests to advance their objects, their expansion, and financial success in every way possible. They have an international strategic and financial interest in doing so. In fact, the whole object of the merger was to strengthen the two forms of service, namely, cable and radio, by amalgamation to prevent them from drifting into a weaker condition by ruinous competitive methods, because England, like some other countries, notably Germany, Italy, and France, has realized the importance of maintaining both forms of service. They also realized that to do this with the highest state of efficiency and no unnecessary capital expenditure and wasteful duplication and operating expense, the only alternative was a combination of the two.
>
> "THERE is no doubt that any proposition that might be submitted to the British merger by one of the American communication companies such as, for example, the question of further transmission rates, routes, classes of service, etc., will be considered from only one standpoint, namely, the effect upon the British merger as a whole.
>
> "We believe that the general attitude of the British government is essentially one of fair play, and while we are not setting up the British merger as a bogie man, it is plain that neither we alone or combined with the Radio Corporation's communication facilities, nor the Western Union alone or combined with the Radio Corporation's communication facilities hold the British merger in the hollow of our hands.
>
> "We do not believe that it is advisable for American communication companies to be placed in a position where they can be menaced by their inferior position if it is possible for them to place themselves in a position of substantial equality. The communications situation has come to the point where it demands the greatest concentration of American communication facilities and research and laboratory facilities to keep pace with the development.
>
> "This is one of the things I had in mind when two years ago I worked out a merger of the Mackay system of telegraphs, cables, and radio with the International Telephone and Telegraph system. This merger brought to the Commercial Cable and Postal Telegraph systems the great research and laboratory organization of the International Telephone and Telegraph system, and it has also joined up the two largest American cable systems into one, namely, the Commercial Cable system in the Atlantic and the Pacific and the All America system running to the West Indies, Central, and South America.
>
> "This picture of an American communication system, giving world-wide service, will be well on to completion if the radio facilities of the Radio Corporation are added to our cable and telegraph system."

Consumers Take a Hand in Defining a Rate Base

IN the program supported by the Utilities Consumers League of New York for the revision of the New York Public Service Commission law, the following statements are made with reference to valuation and the rate base:

"The chief defect in the present system is the lack of a definite rate base upon which the companies are entitled to a return. This is due in part to the vagueness of the statute and partly to a line of court decisions which, under the present system, have largely left the Public Service Commission without capacity to adjust rates for the large number of properties operated under widely varying conditions.

"The present rate base is intended to consist of the 'fair value' of the properties used in public service. The amount depends upon reproduction cost, actual cost, and other elements which are not capable of exact and regular determination. Hence every effort of rate adjustment produces sharp conflict of interest between the companies and the public. The procedure is cumbersome and expensive. The system is unmanageable from an administrative standpoint, and is financially unsound.

"What is needed, is the establishment of a definite rate base which will be regularly shown in the accounts of the companies subject to regular and consistent supervision by the Commission. To provide for the establishment of such a rate base, we deem to be the foremost task of this Commission. Without such an exact basis of rate making, regulation is bound to be largely futile."

THE following argument is also made with reference to capitalization and new construction:

"At present the Commission exercises virtually no power over new construction. It has control only over the securities issued, and virtually must give its approval after the construction has been completed, even if there is doubt as to the wisdom of such construction. It should have full power over construction programs. Every important extension proposed by the companies should have the prior approval of the Commission, which also should exercise supervision over construction and should certify for capitalization only the actual and reasonable costs of installation. The Commission should have power also to determine on its own account what changes, improvements, and extensions are necessary and to order their installation. Only actual cost as reasonably determined, should be allowed by the Commission as the basis of new security issues."

HOWEVER desirable this suggested legislation might be from the standpoint of either the public or the utilities, it is made without reference to the significance of the fundamental law of the land. The Supreme Court has reiterated the rule that utility companies are entitled to earn a return on the present value of their property. As value is not static it is, therefore, impossible to have a definite rate base. What the Commissions cannot do in the way of fixing a definite rate base, the states themselves cannot do. A state legislature can no more violate the provisions of the Constitution than the humblest citizen in the land. It would be possible, of course, for the legislature to provide that a Commission shall certify for capitalization only the actual and reasonable cost of installation of new equipment and facilities. It may provide the terms upon which securities may be issued. It could not, however, make a provision of that kind apply to the rate base. Such an attempt was made in Wisconsin. After a definite rate base was fixed, new plant facilities were added on the basis of their cost. This was known as the split inventory method of valuation, which was subsequently declared illegal by the Wisconsin supreme court and was afterwards declared illegal by the Supreme Court of the United States in the O'Fallon Case.

The legislatures have no more power to fix a definite rate base than they have to declare a certain business to be a public utility if it is not in fact a public utility. It is beyond the power of legislatures to stabilize value.

PROGRAM FOR THE REVISION OF THE PUBLIC SERVICE COMMISSION LAW OF THE STATE OF NEW YORK. Utility Consumers' League of New York. 1929.

A Call for State Laws to Guard against Further Encroachment of Federal Regulation

IN its annual report to the Governor, the Colorado Commission recommends legislation strengthening state regulation, in order to prevent further

Herald-Tribune, N. Y.

PESSIMISM DUE FOR A SHARP DROP

An estimate by Secretary of Commerce Robert P. Lamont predicted that expenditures for construction and maintenance of public works and for public utility extension plans would reach a total of $7,000,000,000 in 1930. This figure did not include outlays for private business expansion and for residential building.

encroachment by the Federal Government in this field. The Commission says, among other things:

"As you no doubt know, our Commission has been taking a very active part in hearings before the Interstate Commerce Commission. These hearings involve the level of the freight rates charged and collected in our territory by the rail carriers. During the last year one member of our Commission participated in the final arguments in Washington, D. C., in Docket 17,000, Part 7, involving all the rates on grain and grain products in the western district, and also Docket 17,000, Part 9, involving all the rates on live stock in the western district. The time that one Commissioner devoted to these two hearings amounted to approximately five weeks, and in addition to this one Commissioner actively participated in the rate hearing at New Orleans, Docket 23,334, involving the rates on sugar from Colorado to points in Oklahoma and Texas. About twelve days were devoted to that hearing.

"One member of the Commission attended a hearing at Chicago in Docket 17,000, Part 12, involving all the freight rates of the products of non-ferrous metals in the western district, giving thereto fourteen days of his time.

"These cases, involving the level of freight rates in our jurisdiction, are highly important to the public interest and require constant attention. Within the past

four years our Commission's time has been mainly taken up with regulation pertaining to motor vehicle operations. The ground work for this regulation has now practically been laid and so much time of the members of the Commission should, if possible, not be taken up with these matters as heretofore. A number of other State Commissioners have the advantage of having examiners hear the testimony in such cases and make their report to the Commission, from which the Commission makes its findings. We suggest that since the individual members of the Commission should have more time to devote to the more important phases of regulation, the Public Utilities Act should be so amended as to authorize the use of examiners to take the testimony. Within the past several years, the Federal Government has gradually taken over certain phases of state regulation in which the element of interstate commerce is involved and there is a great danger that further encroachment by the Federal Government may be brought about. In order to discourage such encroachment, the state governments should recognize their responsibility in efficiently exercising the powers they now have so that state regulation may progress in such a manner that it will be sufficient to properly protect the public interest. When State Commissions are under-staffed, when salaries of the employees of State Commissions are unreasonably low, and when sufficient funds are not forthcoming with which to efficiently regulate, it is inevitable that state regulation cannot properly perform its necessary function and the public interest is injuriously affected thereby.

"In our opinion, everything reasonably possible under all the circumstances should be done to strengthen state regulation so that the states may not lose such regulatory power as is necessary to properly regulate the public utilities within the state."

SIXTEENTH ANNUAL REPORT OF THE COLORADO PUBLIC UTILITIES COMMISSION. Year ending November 30, 1929.

Will the Zone-Fare System Solve the Street Railway's Problem of Competing With the Bus?

As everybody knows, the street railways since the World War, if not passing through the Slough of Despond, have at least been traveling over rough financial ground.

Many factors have been responsible for this, among them the private automobile. The increase in registration since 1915 has been very rapid. Here is the record for California:

"Year	Registration of Motor Vehicles
1915	190,196
1920	595,187
1925	1,451,543
1928	1,822,262"

During this period there have been many changes in street railway fares with varying effects upon the financial position of the companies. An illuminating study of the "Effect of Fare Changes on Street Railway Operations in California" has recently been made by the Engineering Department, Transportation Division of the California Railroad Commission under the direction of J. G. Hunter, Transportation Engineer. The following effect of fare increases is thus described:

"THE experience of the Los Angeles Railway, the largest street railway in California, in increasing fares on October 21, 1928, from basic 5-cent fare to 7 cents with four tokens for 25 cents (6¼ cents), up to July 31, 1929, resulted in an actual increase of revenues of about 10 per cent, coupled with a decrease in travel of about 14 per cent. When corrected for the trend previous to the change, however, these figures would result in an increase of about 12 per cent in revenue with a decrease in travel of about 12 per cent. The paper increase in fare was 28 per cent, based on the actual 80 per cent use of tokens.

"The Key System Transit Company, Oakland, increased its 6-cent fare to 7 cents on January 15, 1926. Travel fell off about 9 per cent while revenues increased 6 per cent during the year of 1926. The paper increase in fare was 16⅔ per cent. In 1927, the increased revenue was but 2 per cent, while in 1928 the revenue was actually 3 per cent less than in 1925. The results of operation for the first seven months of 1929 show a decrease of 3 per cent in traffic and 5.7 per cent in gross revenue.

"The increase of fares on the Sacramento Street Railway on August 15, 1928,

from 5 cents to 7 cents, with four tokens for 25 cents, (6¼ cents a ride) resulted, during the first few months, in an increase in revenue of 10 per cent, with a decrease in travel of 16 per cent. After twelve months, however, revenues were not as great as before the increase in fare and over one-fourth of the travel had disappeared.

"In San Jose, the 6-cent fare was increased on June 1, 1928, to 10 cents with four tokens for 25 cents. The immediate effect of this increase was a decrease in travel of about 8 per cent with an increase in revenues of 1 per cent. Due to the fact that travel was declining before the increase, it may be said that the net immediate effect of the change was a decrease of 4 per ecnt in travel with an increase of 6 per cent revenue, compared to the condition which probably would have existed had not fares been increased. The downward trend of travel, however, has continued, with the result that at the present time both travel and revenues are declining at the rate of about 6 per cent compared with conditions a year ago following the increase in fare. It is interesting to note that about 90 per cent of the passengers make use of the token fare, while the remaining 10 per cent pay the cash fare of 10 cents.

"The Stockton Electric Railroad Company increased its 6-cent fare on September 1, 1928, to 7 cents with four tokens for 25 cents. Travel and revenue prior to the increase was decreasing at the rate of about 2.5 per cent. Immediately after the increase in fare, there was a decrease in travel of 12 per cent and an actual decrease in revenue of 3 per cent. It is apparent, from these figures, that the increased fare was of practically no benefit from an increased revenue standpoint immediately after the increase, while travel dropped about 10 per cent. Subsequent figures show a continuing decline in travel and revenues. Roughly, two-thirds of the passengers make use of the token fare.

"At Fresno, on September 15, 1927, the 6-cent fare was increased to 7 cents with three tokens for 20 cents (6⅔ cents a ride). Travel and revenue decreases of about 6 per cent were occurring before the change while immediately following the change travel dropped to 14 per cent less, the revenues just barely regaining the 6 per cent loss existing before the change. Thus it may be said that the immediate travel loss, as a result of the increase, was 8 per cent while the revenue gain was 6 per cent. The records show that travel is continuing to decline now at about the same rate as before the adjustment, with the result that revenues are now approximately the same as in 1920.

"Approximately one-third of the passengers make use of the token fare, while the remaining two-thirds use the cash fare.

"Fares were increased on the local lines at Pasadena on October 26, 1926, from 6 cents to 7 cents with eight tickets for 50 cents (6¼ cents a ticket). Travel during 1926 was but slightly less than the year before (about 1 per cent). The following year witnessed about a 7 per cent drop in travel with a 6 per cent increase in revenue. Since then both travel and revenues have fallen off at the rate of about 6 per cent a year, so that by 1928 revenues were less than before the increase. The loss is continuing at the same rate at the present time.

"At Bakersfield, in 1924, the 5-cent fare was increased to 10 cents, with 7 tokens for 50 cents (7¼ cents a ride), while, in addition, a $1 weekly pass was made effective. The average fare increased from 5 cents to 7 cents. Comparing the years prior to and following the change shows a decrease of 29 per cent in travel in two years, with no increased revenue despite the 40 per cent increase in average fare. Severe losses in travel, however, had occurred prior to the increase, due, no doubt, to recession in business conditions, making it difficult to say, with any degree of accuracy, just what the effect of the increase in fares was. Reduction in travel and revenues, at the rate of about 7 per cent, on this property are occurring at the present time.

"The Santa Barbara & Suburban Railway, after experimenting with various forms of fare, ranging from 5 cents to 10 cents, with tokens, weekly passes, and identification cards, elected to discontinue the service, as it appeared that regardless of the fare the revenues were not equal to meet the operating expenses."

THE results where fares were not adjusted recently are then described:

"San Francisco is served, in the main, by the Market Street Railway Company, operating on a 5-cent city-wide fare. Revenues and travel have reduced from the 1925 peak approximately 1.5 per cent. The Municipal Railway, serving a considerable portion of San Francisco, has, however, increased its travel and revenues during the same period by 2.2 per cent. Attention should be called to the fact that the city has made some extension of its lines during this time.

"In San Diego, where fares were placed on a basic 5-cent zone system on January 1, 1920, the average fare is 5.45 cents. More passengers were carried in 1928 than in 1925 or any previous year. Travel and

revenue have declined about 1 per cent since the peak of 1926."

THE results of reduced fares are stated as follows:

"In April and May, 1928, experimental fares were made effective on the Los Angeles local lines of Pacific Electric Railway Company on a zone basis. The average fare was decreased from 7.6 cents to 7.3 cents, establishing three 5-cent and 10-cent zones instead of two 6-cent and 10-cent zones. A ticket rate of 6½ cents applies between zones 1 and 2. The first year showed travel practically unchanged, with revenues decreased approximately 4 per cent but with an increasing trend. The month of June, 1929, shows revenues equal to June of 1927 and a 6 per cent increase in travel.

"At the same time, 6-cent fares were reduced to 5 cents in Long Beach, Glendale, and San Bernardino. The immediate effect in Glendale and San Bernardino was an increase in travel. In Glendale, travel increased 10 per cent, with an increase in revenue of 2 per cent. San Bernardino showed about 2 per cent increase in travel, while revenue was reduced 7 per cent. In Long Beach, however, travel increased 43 per cent and revenue increased 19 per cent, due, mainly, to a higher rate on the competitive bus lines. Since that time, the rates have been equalized. At present revenues are about equal to two years ago, while travel has increased about 20 per cent. While San Bernardino shows no substantial change from its immediate result, Glendale shows travel increases of about 40 per cent and revenue increases of 33 per cent, due to improvement and extension of service as well as reduction in fare. In both Glendale and San Bernardino there are zone fares to the more distant points served by the lines, but in the main, the fare may be considered as a 5-cent basic fare."

THE conclusions are of great interest to both the railways and car riders. This is Mr. Hunter's summary:

"In reviewing the records of these seventeen street car companies during recent years, the conclusion seems clear that the private automobile competition is the dominating influence on revenues at this time. The operators who have met this competition by increasing city-wide fares, without adjustment for distance, have seen substantial portions of their patrons turn to walking or the use of the automobile, and in many cases have not secured the anticipated increased revenue. This appears to be true in the larger cities as well as the smaller. In those cities where rates were unchanged, revenues and travel have been but slightly affected. Those who have met the growing automobile use through rates based on competition and on distance have not experienced any substantial loss in revenue, but in all cases there has been an increase in the volume of traffic.

"From this information, it would appear that for the larger cities, where conditions are right, a plan of fares based on the zone system is an appropriate way of meeting the need of increased revenue. Cost of transportation, without doubt, is, to a large extent, based on distance. Practically the entire direct cost of automobile operation is based on the distance traveled. In meeting this competition, it seems out of place to make the same charge for transporting a passenger two blocks as for 15 miles. Yet this is the case in many cities where the community has grown and transportation lines have been extended with the city fare. With increases in the city-wide fare, the short-haul travel has diminished, while the passenger traveling 15 miles is still benefiting at the expense of the short haul passengers. A system of fare charges, based on distance and, to that extent, on costs, seems to be the logical way of meeting the situation.

"GLANCING through the charts on travel and revenue attached to this report, one is impressed with the growth of the San Diego Electric Railway. Through a zone system, established in 1920, fares based on distance were established. Compare this chart with charts of companies which increased to 6 cents or 7 cents during those years. There has been no impairment of travel or revenue on the one hand, compared with substantial declines in travel on the other, despite the fact that San Diego has probably as many automobiles per 1,000 population as any other major city in California or in the United States.

"A further advantage of the zone system is that it provides a means of eliminating odd multi-coin fares, the zone fares being, in most cases, 5 cents and 10 cents, with suitable ticket, token and/or pass fares. Within zones, the single 5-cent fare is generally adopted, with the 10-cent fare between two zones. A reduced rate ticket or token may be provided in the 10-cent zones or a weekly pass may be sold. Under some conditions, both the ticket and pass are sold. The elimination of pennies speeds up service, particularly on one-man cars, by faster fare collection, makes checking of fare payment easier and more certain for collectors and provides a more convenient fare for passengers.

"THE weekly pass system also deserves mention. Our records show, while its recorded use is high, that after trans-

ferring riders and short-haul riders are eliminated, the average fare equivalent to the cash fare is but slightly less than the equivalent cash-ticket fare. The pass provides a form of fare for regular riders which undoubtedly tends to encourage travel and prevent diversion of riders when higher fares are made effective.

"Some of the results obtained in the smaller communities, by reducing the city-wide fare to 5 cents without a zone system, seem to indicate that the financial status of these companies has not been impaired and some business has been recovered.

"It is apparent that the system of fares will not, of itself, solve the electric railway problem. Service is also of paramount importance. Within the limits possible, service must be improved or maintained. Any lessening of schedules or slowing of running time may be as disastrous as an improper adjustment of fares, while the equipment has not always been given the consideration it merits.

"There has not been developed a substitute for street-car operation to take care of mass transportation, and the continuance of the operation of street cars is important for both the traveling public and the owners of these systems, which represent an investment of approximately $130,000,000.

"While the abandonment of street car service in some of the smaller cities may be the result of automobile competition, this is not probable in the major cities of California. With fares adjusted on a proper basis and an adequate service, there would appear to be bright possibilities for the continued maintenance of street car service in such cities."

The result of the study is set out in detail and illustrated by graphs, maps, and tables. It will be of great value to street railway executives and State Commissions.

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The March of Events

Alabama

Rates Filed for New Natural Gas Service

RATE schedules have been filed with the Commission by the Alabama Utilities Company to cover natural gas service when it is finally obtained for the city of Montgomery and surrounding territory. It is thought that natural gas will flow in this area within a few months.

The proposed charges are $1.50 for the first 200 cubic feet or less of gas a month; $1.35 a thousand for the next 2,800 cubic feet; 85 cents a thousand for the next 2,000; and 65 cents a thousand for all amounts in excess of that figure. It is declared that a saving will be created for the consumer as the natural gas flame is twice as hot as manufactured, and consumption will be reduced. Under the present rate schedules the consumer pays $2 as a minimum charge for the first 500 cubic feet of gas a month and $1 a thousand for all consumption above that amount.

California

Further Rate Reductions Desired by City

THE fight for lower gas and electric rates, according to the San Francisco *News*, is to be continued notwithstanding an order by the Commission on January 15th reducing rates of the Pacific Gas & Electric Company in Northern California. The new rates were termed temporary and were expected to result in savings of approximately $8,400,000 to ratepayers.

City Attorney John J. O'Toole has been authorized by the members of the supervisors' finance and public utilities committee to continue the rate litigation. The city attorney believes that the city may succeed in getting even lower schedules when permanent rates are fixed by the Commission. He has stated that the city's experts considered the temporary rates too high.

Connecticut

Court Hears Plea for Action to Remove Commission

THE proceedings started by Professor Albert Levitt, of Greenwich, and others, in superior court at Hartford, to compel the attorney general to start an action for removal of the Commission was heard on January 23rd before Judge Newell Jennings.

Professor Levitt argued that the attorney general was required by statute to file a complaint against the Commission if requested in writing by 100 electors of the state. Deputy Attorney General Averill, who appeared for the attorney general, stated that in order to bring direct action against the Commission the attorney general must allege a material neglect and that he could not do so unless he honestly thought there had been neglect.

These proceedings are based upon the charge by Professor Levitt that the Commission has failed to enforce the statute providing for removal of grade crossings. The answer has been made that the Commission has discretionary power to order crossing elimination and should not enter an order when the financial condition of the railroad does not justify it. The Bridgeport *Post* says:

"Judge Jennings asked Professor Levitt for his conception of the duties of the attorney general upon receipt of a petition embodying some silly or crazy idea, such as the charge that the Commission had ordered red flags flown on trains instead of pink ones. Professor Levitt amended the suggestion to propose an order that 'redheads' be thrown off trains, and said that the statute did not apply to a situation so obviously frivolous."

Florida

Higher Phone Rates Wanted to Attract Capital

THE Winter Park Telephone Company has applied to the Florida Railroad Commission for authority to increase its local exchange rates. This was done, according to C. H. Galloway, president of the company, to maintain its reputation for good service and to continue its extensions to meet the increasing demand for telephones in Winter Park, which, according to reports, is growing rapidly.

The company did not increase its rates during the "boom" as many other telephone companies were forced to do. The company, says the Winter Park *Herald*, invites comparison with other cities to demonstrate its policy of furnishing the best possible service at the lowest possible cost to its telephone subscribers.

Owing to the company's growth, it is declared to be necessary that many thousands of dollars of new capital be secured each year to care for extensions of property, if everybody who applies is to be supplied with the class of service demanded. During the nineteen years existence of the Winter Park Telephone Company its rates have been increased by the Commission on only two occasions.

Georgia

Chairman Perry Reviews Utility Regulation

JAMES A. Perry, Chairman of the Georgia Commission, in an address before the members of the Exchange Club at Griffin on January 21st, reviewed briefly the history of the Commission and outlined the increased scope of regulation during the years since the establishment of that body.

A difficulty experienced by the Commission, he said, is in getting the public to go to the trouble properly to acquaint the Commission with complaints and in the fact that too often, regardless of the merits of a complaint, there is too much disposition to hurry and an indisposition on the public's part to do more than discuss it for the moment and then let it go.

"We invite complaints," said Chairman Perry, "we invite constructive criticism, but it is only constructive criticism that can be of any real help to the Commission or to the public. The Commission, human like the people themselves, prescribes rates just as low as can be justified. In fact, it is the policy of the Commission to prescribe rates that will make possible the legitimate expansion and work directly for economy in the affairs of the homes and the business of the public. To state it even more pointedly, but for the abnormal increase in consumption in comparatively recent years, rates prescribed at different times by the Commission would have worked for a destruction of the property."

The speaker commented upon the fact that there has been a misunderstanding by the public because the Commission had increased rates after the deflation period following the World War. He pointed out that if the Commission had met the responsibility of providing reasonable rates during the high price period of the World War, the necessity for increased rates when the period of deflation came would never have arisen.

"It is fair to say," he continued, "that this Commission then deserved a criticism of the public; not, however, for increasing the rates at the time it did but, on the contrary, for not having prescribed really reasonable rates when everybody had a job and most everybody had some money in the bank."

Illinois

Bus and Trolley Companies Clash at Hearing

THE Chicago Surface lines, on January 28th, offered before the Commission to install busses on only a portion of 34 miles of northwest side streets in answer to threats of the Chicago Motor Coach Company to abandon service completely if the surface lines were given permission to operate in Diversey and Belmont avenues.

Members of the Commission, says the Chicago *Daily Tribune*, indicated they were loathe to issue any order which would drive the existing motor coach service off the

streets and leave the northwest side without adequate transportation for the three months which the surface lines said would be needed to install trolley busses.

It is declared that the coach company does not oppose the installation of surface line feeder bus service by the railways in Diversey and Belmont avenues if carried on in connection with lines to be operated in the remainder of the territory, but that if the Commission orders the railway company to install feeder bus service in Diversey avenue it should also order the Chicago Motor Coach Company simultaneously to cease operations on other lines which cannot be expected to operate without Diversey.

The routes proposed by the railway are approximately 16 of the 34 miles of routes which the motor coach company has threatened to abandon. The attorney for the railway contended, however, that 95 per cent of the persons living in the involved area would have service to within four blocks of any of the routes.

In reply to a question by Chairman Charles W. Hadley as to what would happen if the Commission ordered the company to install service on 25 miles instead of on the 16 miles proposed, Attorney Francis X. Busch said: "Then, if in our opinion public necessity and convenience did not demand the additional 10 miles, we would go to the courts. We propose to do only what the special equipment and renewal fund, which is replenished monthly with an average of $355,740, permits us to do this year."

Indiana

Organization Formed to Combat Phone Rate Raise

TELEPHONE subscribers in 15 towns served by the Northern Indiana Telephone Company, who a few months ago were organized to help farmers in intermediate territory combat increased telephone rates, says the Indianapolis *News*, have organized to fight their own battles.

Appeals by the company for the towns to get together and help the company win back about 900 subscribers said to have been lost through a fight on rural phone rates, according to the *News*, have been rejected by the patrons who, as city subscribers, now are faced with 25-cent to 50-cent increases on their own service. This paper says:

"It has been estimated by the organized patrons that telephone rates in this area have been increased more than 50 per cent since the Mote interests bought and merged several small exchanges. The higher cost of telephone service has been brought about, they reason, not alone through increase of local rates, but through the establishment of toll charges on calls between towns which reduced by one-half the number of connections formerly available to the user at lower rates."

Iowa

Rate Increase Incites Move for New Company

STEPS to organize a new telephone company for Osceola have been taken as the result of resentment against phone rate increases following the sale last September of the Bell Telephone Company to the Middle States Utility Company, according to the Des Moines *Register*. It has been reported that some individual subscriptions to finance a new company have amounted to $1,000.

The city council brought suit to place the rates on the old basis or have the Middle States Company remove the telephone poles. A petition was filed in Federal court in December and it was dismissed.

Kansas

Wichita Company Charges Unfair Competition

THE Wichita Gas Company has asked for a rehearing in proceedings in which the Commission granted a certificate to the Wichison Industrial Gas Company, on the ground that the Commission is attempting to force lower rates by permitting unfair and unlawful competition.

The Wichita Company alleges that its present rates have been adjudicated as fair and reasonable. The Wichison Company has of-

fered gas to the Wichita Gas Company at the city's gates for 25 cents per thousand cubic feet. The Wichita Company now is paying 40 cents and bases its rates on that payment wholesale. Investigation was recently instituted by the Commission into the rates of this company and several other companies operating in Kansas.

Maine

Question of Interstate Operation in Abandonment Case

THE Commission, on January 15th, held hearings on the petition of the Bangor Hydro-Electric Company for authority to discontinue its Charleston line. The question was raised whether the Commission had jurisdiction, because of interstate shipments. The Portland *News* says:

"The hearing on the Charleston line was devoted to the question of whether or not the Public Utilities Commission has jurisdiction in the matter, the point having been raised at the previous hearing that the petition for discontinuing the road should be addressed to the Interstate Commerce Commission.

"Attorney Frank Fellows, counsel for the remonstrants, claimed that the Bangor Hydro-Electric Company had connections with the Maine Central and Bangor & Aroostook Railroads and made car lot shipments from points on its line to points outside of the state.

"Considerable testimony was presented by the petitioning company to show that the equipment of the lines it operated were not suited to use on steam roads, being of light construction, and that the only cars loaded at its stations for inter and intrastate shipments were cars owned by steam railroads.

"There was also considerable testimony as to the method of billing these shipments, the railroad contending that all shipments were rebilled on reaching either the Maine Central or Bangor & Aroostook lines.

"Testimony was presented by the remonstrants to show that prior to 1918 car lots were billed through to destination on the bills issued by the electric road and that since the date named the original bill of lading issued at points on the electric road are sent direct to consigners, regardless of any rebilling by either of the steam roads.

"Treasurer Dole of the petitioning company testified that the Bangor Hydro-Electric Company was not a member of the American Railway Association, having declined to affiliate with this association as it wished to avoid coming under the provisions of the Interstate Commerce act.

"It has issued securities without seeking permission from the Interstate Commerce Commission to do so, reporting to this Commission that it had received authority from the Maine public utilities to issue such securities.

"Colonel Shumway, counsel for the petitioners, claimed that the Bangor Hydro-Electric Company's lines did not come under the Interstate Commerce Commission's control, citing decisions in support of his argument."

Michigan

Confiscation Verdict Fought by State

THE finding by Federal Master William S. Sayres on January 21st that rates fixed by the Commission for the Michigan Bell Telephone Company were confiscatory, was not accepted by state and municipal attorneys. These parties started to wage a battle to prevent confirmation of the master's report by the Federal court and to prevent an injunction against enforcement of the rates fixed by the Commission.

The special master found that the company was entitled to a return of 7 per cent on a total fair value of $160,501,580. The rate fixed by the Commission, according to Mr. Sayres, would deprive the company of more than $3,000,000 annually to which it was entitled.

An interesting feature of this case is the apparent conflict between the Federal ruling and the ruling of the state supreme court upon payments under the license contract to the American Telephone & Telegraph Company. The state court sometime ago held that the company could not charge as operating expense any payments under this contract unless it furnished evidence showing the value of the services rendered in return for the payment. The special master, however, said that the question as to the legal effect which the relations between a subsidiary cor-

poration of the American Telephone & Telegraph Company, such as the Michigan Company, had on this contract, had been already litigated and adjudicated in the United States Supreme Court adversely to the contention of the Commission.

Survey of Detroit Street Railway Asked

MAYOR Charles Bowles, according to the Detroit *Free Press*, has instructed the street railway commission to make an immediate survey to determine whether the present street car fare of 6 cents is sufficient to meet the needs of the system.

He pointed out, says the newspaper, that he was not familiar with the present condition of the finances of the system but that he was desirous of determining as soon as possible whether the present fare is adequate to meet all of the demands that are made upon the municipally owned railway which is operated in the city of Detroit.

"I have been informed that your auditor, John H. Morgan, made a report recently which showed that the present fare was inadequate," Mayor Bowles told the commission. "I have not seen that report, but it seems to me that a definite and conclusive survey is essential in order that we may know whether the system is meeting all of the obligations which are properly to be charged against it.

"Under the provisions of the city charter the rate of fare must be sufficient to meet all charges against the system," the mayor said. "I do not know at this time whether or not that is the case, but I believe that it should be determined as soon as possible."

Massachusetts

Utility Bills Rejected by Committee

THE legislative committee on power and light has reported adversely on three bills relating to public utilities. These were aimed to prevent the imposition of a service charge.

Another bill which was reported adversely would have given the State Department of Public Utilities further authority to approve contracts of gas and electric companies for the purchase of gas. A bill which was reported favorably would require gas and electric companies to furnish a printed statement of the rates paid by the customer with every bill for gas or electricity.

Missouri

Shorter Wait to Attract More Car Riders

THE encouragement of car riding by means of more frequent car service is being tried by the St. Louis Public Service Company. An increase of 350 round trips a day, or 22,000 seats on six lines, was added.

Officials say that under the new schedule car riders will never have to wait more than five minutes for a car on these lines, even in mid-day. During the rush hours, cars will be 1 to 1½ minutes apart on five of the lines and 2 minutes and 6 seconds apart on another line. The St. Louis *Globe-Democrat* reports:

"Stanley Clarke, president of the Public Service Company, said the increased service is given because for the first time in years, fares are approaching the actual cost of transportation.

"The new experimental schedule granted by the Public Service Commission of twelve rides by weekly commutation ticket for $1, with excess rides for 5 cents, 10 cents for nonticketholders, and 5 cents for children, Clarke said, is giving a return approaching the sum it is entitled to upon its investment, according to the ruling of the Commission.

"'We hasten to give back some of the receipts from the increased fare to our patrons in better service,' said Clarke. 'We hope the increased service will attract a greater number of car riders.'

"Clarke told the St. Louis Transportation Survey Commission, of which he is a nonvoting member, recently, his company would

spend $25,000,000 in betterment of service if it could get the money. He was discussing the recommendation of R. F. Kelker, Jr., consulting engineer, for purchase of 800 modern cars, rerouting, repaving, extra power plants, etc., the whole costing $23,600,000."

New Jersey

Move to Set Aside New Traction Fares

A COMBINED suit brought by West New York and Weehawken to set aside the new rates of the Public Service Co-ordinated Transport was brought into supreme court on January 24th through a petition for review of the proceedings before the Commission on certiorari.

Counsel for the municipalities charged generally that the new rate fixing a 10-cent fare for occasional riders is illegal. Moreover, they allege separate proceedings should have been brought in the fixing of trolley and bus rates. Another point submitted was that the Commission had failed to suspend the old rates, allowing the new rates to become effective automatically. It was also argued that the plan of selling ten tokens for 50 cents with a 10-cent single cash fare is illegal and discriminatory.

Counsel for the Commission agreed that the cities had a standing in court to prosecute the proceedings, but he submitted that the Commission had acted within its power and that its action was reasonable. The company had been treated as a single public utility, with the result that the Commission had to consider railway fares and bus fares together.

The charge of discrimination was met by the remark that mileage books, commutation tickets, tourists tickets, special excursion tickets, and other forms of transportation on railroads all create discrimination between travelers enjoying the same service and that such discrimination is lawful and has been approved.

New York

Telephone Rate Tangle

EARLY in February there was in prospect a spirited war over telephone rates. Drives were underway all along the line—in the legislative sector, the Commission sector, and the Federal court sector.

The trouble started back in 1926 when the Public Service Commission established a rate schedule for the New York Telephone Company to apply in New York city and many other communities throughout the state of New York. These rates were attacked in Federal court on the ground that they were confiscatory, and finally the company's contentions were upheld and an injunction was granted during the latter part of 1929 to restrain the Commission from enforcing the tariffs.

The court refused to send the proceedings back to a special master to make separate findings as to the confiscatory effect of the rates for New York city and rates outside of the city. It was pointed out that the court was not engaged in the task of rate fixing but that the question was one of confiscation —whether the company was able to earn a fair return on a fair value of its property devoted to its entire intrastate business. The court said that it left to the Commission the readjustment of the rates upon its findings of confiscation. Therefore, it was held that the company was entitled to injunctive relief until the Commission should have fixed rates consistent with the court's opinion.

New rate schedules were then established by the New York Telephone Company to go into effect February 1st. These were computed, according to the company, to produce a return of 7 per cent (approved by the court) upon a new rate base. This rate base was determined by adding to the value approved by the court as of July 1928, in the sum of $475,000,000 for the property directly affected by the rates, an additional $13,000,000 spent since July 1, 1928, and in addition there was added $120,000,000 which the company said would be spent during 1930 in a broad expansion program.

The opponents of rate increases were immediately up in arms. The Public Service Commission ordered a public hearing and the Governor complained against the practice of utilities going over the heads of the Commissions to the Federal courts. In a message to the legislature he urged an appeal to Congress to curb the power of the Federal tribunals.

The legislature, on January 28th, memorialized Congress to enact a law compelling utility corporations to take their cases into state courts before appealing to Federal courts. On

the same day, hearings began before the Commission.

The Commission, on January 31st, moving swiftly in anticipation of the increase to take effect the following day, partially blocked the rise by allowing the telephone company an increase of $11,000,000 instead of the $14,000,000 for which the company had planned. The Commission pointed out that its investigation had disclosed that the company's rates were based partially upon estimates for 1930, and since these were only estimates, the Commission considered that it should not permit the full amount of the increases based thereon to be enforced upon the ratepayers until a full and complete examination by the Commission could be had.

The company immediately moved to cancel the order because it was "unfair and in violation of the Federal court order." It was intimated that resort would be had to the Federal court to uphold the company's position.

The state law requires that a telephone company shall give the Commission thirty days' notice of any rate increases by filing the proposed new schedules. This the company did not do, but it relied upon the terms of the Federal court order, which, after enjoining the enforcement of the rates fixed by the Commission, continued:

" . . . until the Public Service Commission, in accordance with law, fixes new rates, rentals, and charges for the classes of telephone service covered by said orders of the defendant, the enforcement of which is permanently enjoined by this decree, the plaintiff (which is the telephone company) may increase its rates, rentals, and charges for such services provided and upon condition that such returns shall not be in excess of 7 per cent upon the fair value of its property."

Receivership Precipitates Trouble for Trolley Pact

THE New York State Railways have been operating for several years under a service-at-cost contract which provides for a sliding scale of fares instead of the old 5-cent franchise rate in Rochester. Under a provision of the contract, the receivership of the lines would bring about its termination.

Receivers were appointed by Federal Judge Frederick H. Bryant on December 30th for the New York State Railways, operating in Rochester and other cities. Negotiations were then begun for the mutual consent of the city authorities and the receivers to continue the contract until next August, but representatives of the city proposed as a condition that school children be carried for 5 cents and that tickets be sold on the street cars. At the time of writing it was predicted by some that the school fare proposal might be accepted but that tickets would not be sold upon the cars.

After the appointment of the receivers, the Commission began an investigation to determine who were the true owners of the New York State Railways. It had been believed that the Associated Gas & Electric Company was in control, but later developments indicated that their control had passed into the hands of other parties.

Bondholders are also interested in the street railway situation. A mortgage of $2,130,000, securing Rochester Railway Company bonds, will mature April 1st. Default in the payment of interest on these bonds has already been made. There is a dispute as to whether the mortgage is supported by all of the properties of the New York State Railways or whether it covers only certain real estate in Rochester which was covered years ago when the mortgage was given. A protective association has been formed to look after the interests of bondholders.

Chairman Prendergast Resigns

ATTEMPTED interference with the deliberations of the Public Service Commission has been given as the reason for the resignation on February 3rd of William A. Prendergast, who, since 1921, has served the people of the state of New York as chairman of the Public Service Commission.

Governor Franklin D. Roosevelt, it is reported in the Rochester *Democrat & Chronicle*, admitted that the resignation arose from a difference of opinion on the matter of policy in the regulation of public utilities. Mr. Prendergast, in explaining his reasons for resigning, is reported as saying:

"Governor Roosevelt has certain ideas relative to the regulation of public utilities in this state, with which ideas I am not entirely in sympathy. Amongst other things, I do not feel that the Public Service Commission, which has quasi-judicial functions, should be influenced in the exercise of those functions by the executive or any other state agency."

Ohio

Phone Inquiry Ends

THE rate case of the Cambridge Home Telephone Company was brought to an end so far as hearings are concerned, on January 16th. The case was to be submitted on briefs for decision within three weeks.

The Commission has made a searching inquiry into Kansas City holding company methods in operating telephone companies in Ohio. This is said to be the first case heard under the new Carpenter Law, which seeks to speed up the handling of rate cases. The proceedings were started last August and a complicated investigation was made by the Commission's new Bureau of Investigation.

Oregon

Service at Cost Urged for Street Railway

THAT street railway transportation be furnished to the city of Portland on an actual service-at-cost basis, according to the Portland *Journal*, is the recommendation of James W. Carey and Kenneth G. Harlan, rate experts in the employ of the city commissioners, in a 64-page report submitted by them on January 22nd, with an accompanying endorsement of City Attorney Frank F. Grant. The *Journal* says:

"Carey and Harlan both emphasized the point that in undertaking to put the proposed plan into effect it is a vital factor that there shall be a valuation of the physical properties of the P. E. P. street railroad system, entirely separate from its other holdings, and that upon the accuracy of this valuation would depend very largely the success or failure of the plan proposed. Carey stated that the cost of the valuation would be from $15,000 to $20,000."

An increase in street car fares from 8 to 10 cents has been under consideration before the Public Service Commission.

South Carolina

Wide Investigation of Electric Rates Advocated

A SWEEPING investigation of electric power and light rates, says the Charlotte *News*, is to be recommended to the general assembly by a committee authorized in the 1929 session to make a survey to determine if such an investigation is warranted on account of the varying scale of rates now in effect. This paper continues:

"Decision to ask for a state-wide investigation under direction of competent electric engineers and rate experts was reached at a meeting of the legislative committee here today. A report will be compiled showing rate discrepancies and will be submitted to the committee Wednesday. When the report is approved, it will be submitted to the general assembly with recommendations for an adequate appropriation and an enabling act which will authorize the investigating committee to have access to books of the power companies.

"Five companies are now supplying a great percentage of electric power in the state, as follows: Duke Power Company, Carolina Light & Power Company, Broad River Power Company, South Carolina Power Company, and Southern Public Utilities Company."

The annual report of the Railroad Commission, submitted to the legislature, shows that few municipalities now own their own electric plants and that the increased holdings of these five companies has resulted largely from purchases of plants owned by towns and cities.

Lines have been extended to serve new territory, both urban and rural, so that more people are now being served with electric current than ever before in the history of the state. These changes have added to the Commission's work in adjusting and revising rates in the territory where distribution systems have been extended and where properties have changed hands.

Virginia

Lower Residential Rates to Be Considered

A REDUCTION in electric rates for householders, according to the Richmond *News-Leader*, will be considered at the February meeting of the directors of the Virginia Electric & Power Company. The proposed plan is expected to result in a saving of several hundred thousand dollars annually for small consumers but is designed to result in a greater volume of business.

A proposed schedule of rates to apply to the entire system in Virginia and North Carolina has been in the hands of the company's rate experts and experts from Stone & Webster interests, owners of the Virginia Electric & Power Company. It is said that this will not affect manufacturers or businesses.

A feature of the new plan is a sliding scale of rates under which the more current used the cheaper will be the rate. This is intended to stimulate the use of electricity for cooking, heating, refrigeration, and other household purposes.

West Virginia

United Fuel Gas Rate Case before Commission

REPRESENTATIVES of various municipalities gathered at Charleston on January 21st to combat the proposal of the United Fuel Gas Company for higher rates. The company's side of the case was submitted to the Commission in October and November.

Criticism was made at the hearing in regard to expenditures made by the company, including legal expenses, engineering fees, and organization charges. The assertion has also been made that much of the property is in a greatly depreciated condition.

Wisconsin

Suburban Car Fare Plea before Court

CIRCUIT Judge Walter Schinz, on January 18th, considered a motion by Attorney E. J. Harrington, former city attorney of former North Milwaukee, for a temporary injunction to restrain the Electric Company from charging more than the regular 7-cent car fare to and from former North Milwaukee, which is now a part of the city of Milwaukee.

Refund coupons from the street railway were demanded, through Assistant City Attorney Walter J. Mattison, for all fares in excess of the 7-cent fare. The franchise granted to the company in 1910 provides that the rates should be uniform anywhere within the corporate limits of the city, it was argued. North Milwaukee is now a part of the city, and it was contended that 10 and 13-cent fares are illegal under the franchise. It was asserted that unless there is an authorization by the legislature, the Commission has no jurisdiction in the matter of altering the franchise. Attorney James D. Shaw, representing the company, replied that the question of fares is before the Commission and that the circuit court is without jurisdiction.

Expected participation by the town of Lake in the effort of the suburbs to get rebate coupons on street car fares, says the Milwaukee *Sentinel*, did not develop in a town meeting held on January 24th. Herbert J. Pieper, the town attorney, advised that the town should wait until Judge Schinz had decided the North Milwaukee application. It was believed that the decision would include all territory now in the city limits on which zone fares are paid, whether the judge approved or disapproved the issuance of refund coupons.

The refund coupons, if issued, according to Clarence C. Krause, former assemblyman and present supervisor of the town of Lake, would not be valuable unless the Commission extended the city fare to the city limits. The Commission has the matter under consideration, and, to judge from the papers, suburbanites are following the case with much interest.

The Utilities and the Public

A Bill for the Free Transportation of Commissioners and Their Aides

It is of more than passing interest to note a bill introduced in Congress by Senator Smoot and Representative Colton to permit public carriers to give free transportation or reduced rates to members, attorneys, or experts of state regulatory Commissions when traveling on business of the Commission. This movement seems somewhat out of line with the accumulating trend of decisions from these same Commissions disapproving of free or reduced service to any particular group. It has been the tendency in recent years, as evidenced by these decisions, to cut off, rather than to extend, free service privileges by public utilities.

There was a time when free or reduced service was extended quite frequently to charitable institutions, churches, clergymen, clubs, fraternal organizations, and others from whom no direct benefit was derived by the utilities. There were also the stockholders, contract holders, public officers of municipalities from whom franchises had been secured, owners of equipment, employees, and other classes who had contributed something in the way of property or services towards the utility.

Little by little the Commissions have been whittling down this list. Free telephones have been discontinued to sheriffs' offices. Hospitals and religious institutions have been asked to pay their own way. Statutes permitting free or cut-rate transportation for clergymen have been repealed—all on the theory that free or reduced rate service is opposed to the general policy of all regulatory legislation. Today the free transportation of policemen and firemen in uniform by street railway companies and of employees is about all that is generally practiced, although there are yet many states that permit reduced rates or free service by railroad companies to clergymen.

It would naturally follow from Senator Smoot's bill that if State Commission members and employees were permitted to travel free, the same courtesy should apply to the Interstate Commerce Commission. On December 31, 1929, the Interstate Commerce Commission alone employed 2,105 persons. If the personnel of the State Commissions averaged 250 persons each (which, by the way, is a very conservative estimate) we would have approximately 15,000 persons all eligible to travel to any part of the country at any time as long as they could make a showing that they were on Commission business. It would be interesting, if it were possible, to ascertain the sentiment of the State Commissions themselves on such a proposal. Speaking on this topic the *Traffic World*, a railroad journal, states:

"Even if the courtesy of free transportation were employed only when the recipients were actually traveling on regulatory business, we hardly see the justice of the railroads carrying free or at reduced rates persons whose business it is to regulate them. And it requires no flight of the imagination, either, to foresee a situation in which the passes issued in pursuance of the proposed legislation would not be confined to occasions when the user was traveling on business connected with his office. It was so when, under government railroad operation, shipper members of the rate committees had passes. It was quite right, of course, that they should have free transportation when doing necessary traveling on account of their duties as members of rate committees, and some, no doubt, thus confined the use of their passes; but others used them for themselves and members of their families on quite other business—or pleasure—and everybody can understand that this is the temptation and the tendency."

It is also interesting in this respect to consider a recent action of the Interstate Commerce Commission compelling the payment by various railroads for the hauling of their private cars off their own lines. This has been interpreted as an indication of what the Federal Commission thinks of free reciprocal service between railroads as a general principle. The Commission has not yet gone into the matter of passes to shippers and employees concerning which there is heard much accusation of abuse.

Alabama Utility Permitted to Cut Electric Rates to Churches

SPEAKING of rate discrimination brings up for consideration another recent development in the matter of privileged service—this time with regard to electric utilities. On January 7th, according to a press report, the Alabama Public Service Commission authorized the Alabama Power Company to extend reduced rates to rural churches. The Commission ordered the utility to reduce the demand charge to $1 for all rural churches served by it. This charge had heretofore been the same charged for residences and ranged from $1.75 to $4 per month. There were thirty-eight rural churches reported to have been affected by the order and twenty-nine additional churches were expected to be connected at a later date.

A diversity of opinion still exists as to the propriety of discriminating in favor of religious institutions. It has been permitted with Commission consent in California and Maine. On the other hand, it has been expressly condemned by the Missouri, Wisconsin, Indiana, and Illinois Commissions.

Furnishing free service to churches in compliance with a franchise provision has been called by the Illinois Commission an unlawful discrimination since such service cannot be regarded as compensation to a village for the privilege accorded to the utility.

In other words, furnishing aid to religious institutions is no doubt a very commendable action if done with our own money, but there is some question as to its propriety when we

do it with somebody else's. When a utility is permitted or ordered to discriminate in favor of churches, it is in effect compelling the other ratepayers to contribute something without their consent.

Of course, the other side of the argument is that such discrimination is justified in that it stimulates good will in the community towards the utility, costs but a trifle, and promotes social and civic development which in the end is likely to be reflected in increased patronage.

Corporations Enjoy Greater Rights Than Individuals in Utility Operations

THERE was a time when many successful and noted enterprises were conducted under a "proprietor" sign, but slowly and surely the "Inc." has crept into all business affairs of any importance. The days of individual proprietorship seem to be numbered in the utility business just as in every other kind of business. Modern commerce appears to demand the corporate entity for prolonged success. There is today not one outstanding venture remaining under a proprietor. The partnership still survives, but chiefly among the professions. All of the great old business firms have yielded to incorporation.

The reason for the necessity of the corporate form in business is chiefly because of its immortality and flexibility of management. When a partner or a proprietor dies, his business affairs are usually tied up in court and usually suffer from the process. Likewise, firms and proprietorships are hampered by the inability of the principles to be everywhere at once to execute powers which they cannot very well delegate to any one else.

In considering the public utility business we find an added objection. When the state grants authority to operate a utility there must be some entity, corporate or otherwise, that it can hold responsible for the service. Naturally enough a proprietor can be held responsible only so long as he is alive. When he dies, his obligations die with him, unless his heirs care to assume them. A utility corporation, on the other hand, can only die with the express permission of the state. It is in the public interest, therefore, that authority for such an important undertaking as utility service should be given to an applicant not likely to bring the service to an abrupt end, or to tie it up in a probate court. For this reason, the Commissions in awarding certificates between rival applicants have even favored corporaations over individual applications, all other things being equal.

A more recent treatment of this subject arose in the Empire state in a controversy over the transfer of a certificate to operate a bus line in Albany. In 1914, the New York Commission granted to a Mr. Peter Smith a certificate to operate a route between the state capital and Altamont, New York. In 1915, a law was enacted requiring certificate holders to obtain consent of municipalites through which their bus routes passed. Peter Smith never obtained such con-

sent from the city of Albany, but instead discontinued his operations.

In 1929, Mr. Smith having died, his daughter and heir, Mrs. Harriet Avery, applied to the Commission for authority to transfer her father's certificate to the Colonial Motor Coach Company. It was the company's intention, of course, to resume operations under the old certificate. The application was opposed by another company which had secured a rival certificate as well as local consent from the capital city to operate. They opposed on two grounds: First, that the Smith certificate was void for nonuse, and second, that it was ineffective because of his failure to obtain the local consent required by the statute of 1915.

The Commission decided on the first point that it had no authority by law to annul or cancel a certificate for nonuse. On the second point, however, it was held that if Smith had been incorporated in 1914, the 1915 Act could not have affected his vested corporate right. Being an individual he was, by law, amenable to the subsequent legislation requiring him to obtain the local consent from the city of Albany.

In other words, an individual may not operate a motor bus line over the streets of a municipality in New York state under a certificate granted prior to the enactment of the 1915 law requiring the consent of such a municipality unless he obtains such consent, notwithstanding the fact that a corporation has the right under the law to do so.

The New York Telephone Controversy Still Persists

THE New York telephone rate tangle has been in the limelight so long and its details and ramifications have been discussed so often that it might be of interest at this time, now that the United States Court has handed down what appears to be the final decision in the case, to take stock of just what has happened and what has been accomplished to date.

In 1923, the New York Telephone Company appealed to the Federal court against the enforcement of certain rate orders of the New York Public Service Commission. In view of the importance of the case it was referred by that court to a special master. There were hearings for over four years. Approximately 37,000 pages of testimony were taken and many thousands of exhibits were introduced. In the meantime, on May 26, 1926, the Commission issued more rate orders. These also were attacked as confiscatory in Federal court, and this new controversy was also referred to the special master. What has happened with these issues?

The New York Telephone Company originally claimed that its property was worth $727,000,000. A special master, appointed by the court, cut this figure down to $518,109,584. The statutory three-judge court further modified the valuation to $397,207,295. So much for the rate base.

Respecting the rate of return, the

company contended that anything short of 8 per cent would be confiscatory. The city, on the other hand, thought that a 6 per cent return would be quite sufficient. The special master agreed with the company and approved of the 8 per cent rate, but the Federal court, in modifying his report, split the difference and ordered a return of 7 per cent. Reducing these percentages to figures, the action of the court resulted in cutting the increased revenue from $21,578,078, recommended by the special master, to $7,933,866.

This decision appeared to make both sides happy when it was handed down—the utility because the Commission's orders had been restrained and its allegations of confiscation had been vindicated—the city because the court had modified the master's report so materially.

But this harmony was short-lived. A new difficulty has arisen. The court valuation was only as of July 1, 1928, and the utility has added a sum to its rate base which it thinks proper in view of certain additions to its plant. The New York *Times*, in summing up the situation, states:

> "Left somewhat to its own devices, the company, without consulting the Commission, added to that valuation a round $133,000,000, representing alleged capital expenditures from July 1, 1928 to July 1, 1930. It contends that four-fifths of this sum will have been invested by February 1, when the new rates go into effect; the July 1 date is taken in order to strike an average for the year, in accordance with the practice of the Commission."

Protests against this action of the company have been heard at Albany before the New York Public Service Commission. The Commission's authority with regard to this matter is now limited. Apparently it may only decide as to the correctness of the company's accountancy in including the amount for additions to the plant since the date of the valuation fixed by the court's decision. There have been suggestions of an appeal to the United States Supreme Court by the representatives of the ratepayers, but, in view of the recent utterances of the highest court in the Baltimore Railway Case, indicating that a 7½ or an 8 per cent return might be necessary to avoid confiscation, it seems to be the consensus of opinion as evidenced by press reports that the city and Commission have about decided to let well enough alone.

The Michigan Commission Adopts a Blue Sky Policy

HAS a Public Utility Commission any right or duty to prevent stock watering by a utility? This raises the age old question of blue sky regulation, which many thought had departed from the realm of utility regulation at least since Smyth *v.* Ames. But apparently the blue sky ghost will not be downed.

Before the days of the present value doctrine, the utilities' rates were very often based on capitalization. This meant that any watering of stock or overcapitalization by utility corpora-

tions would result in higher rates, or poor service, or both. Since the Supreme Court has dictated the actual value as the rate base, the question of watered stock has become of little significance to the utility consumer as such, but it continues to have a bearing on the utility shareholders. With the recent movement of many utilities to stimulate good will and cooperation among its patrons by seeking to make them shareholders of its own securities, it looks as if the Commissions may have to consider whether or not they will protect shareholders' interests as well as those of the ratepayers'.

During the last month the Michigan Commission has committed itself to just such a policy. It has handed down a decision having to do with the sale of nonpar stock by public utility corporations at an increased price over that of an original or previous issue. The order of the Commission is briefly to the effect that such sales will not be permitted except after a showing either of increased value of assets, or a well-demonstrated earning capacity over a period of years warranting such an increase.

This is the first time, according to the Michigan Commission, that an order has been issued passing upon the question of the fluctuating values of nonpar stock in the same financial structure. Commissioner Robert H. Dunn, Chairman of the Michigan body, made a statement regarding the order.

In this statement we are told that on October 31, 1929, the Kohler Aviation Corporation asked the Commission for authority to sell four thousand shares of nonpar stock for a total of $20,000 or $5 a share. Prior to that date the utility had issued thirty-two thousand shares of nonpar stock for $90,000, averaging $2.81 per share. Should the Commission authorize the sale of the additional stock at a different value?

Section 12 of the Michigan Blue Sky Law provided that the *securities commission* should not authorize the sale of nonpar stock at a price in excess of the book value as shown by the company's record, unless there was also a showing made of net earnings of not less than 5 per cent for a period of at least one year immediately preceding the application. But this prohibition was directed only to the securities commission.

Chairman Dunn, in explaining the condition of the Commission, admitted that while the blue sky law covered only the actions of the securities commission, yet the Public Utilities Commission assumed, inasmuch as it had, by statute creating it, full discretionary powers, it could adopt as a policy statutory provisions which were made mandatory on the securities commission, and particularly since the Michigan Public Utilities Commission virtually supplanted the securities commission jurisdiction, when the issues sought to be authorized and sold were public utility securities.

The Commission admitted that a different rule might obtain in different states regarding nonpar stock at different prices, but that in Michigan henceforth the policy of the Commission would be in accord with its decision in the Kohler Case.

Control over Water Carriers Is Denied to Federal Commission

FREEDOM of the seas—from regulation by the Interstate Commerce Commission was the purport of the decision handed down by the United States Court of Appeals from the Fourth Circuit. This significant ruling appears to settle once and for all a rather troublesome bugaboo raised by somewhat ambiguous language of Congress in a clause of the interstate commerce act giving the Commission jurisdiction of water carriers where they engage in the transportation of freight and passengers under "common arrangement" with rail carriers. What was meant by "common arrangement?" This question has been bothering both the steamship companies and the Interstate Commerce Commission for some time.

Some months ago the Interstate Commerce Commission determined to find out just what was meant by the provision and asked the Attorney General to institute a proceeding for the purpose of compelling the Munson Steamship Line to file with the Commission a schedule of its rates and charges for transportation service by water between Baltimore, Maryland, and Florida ports.

The court in denying the application of the Attorney General held that it was the intent of Congress to subject water carriers to Commission jurisdiction only to the extent necessary to prevent evasion of the interstate commerce act by railroad companies.

The court construed the term "common arrangement" to be a compact "between the carriers themselves, giving to one or the other, or both, such an interest in or control over the entire undertaking as to constitute the continuous transportation in some sense a common enterprise; for under no other sort of arrangement would there exist the possibility of manipulating water rates so as to evade the act designed for the regulation of rail carriers."

In other words, the clause was intended to cover only attempts by railroad companies to avoid rate regulation by the subterfuge of carriage by water just as bus companies frequently attempt to evade state regulation by unnecessarily crossing state lines. Bona fide steamship companies, however, operating between United States ports, are still free from any sort of regulation.

Gas Utility Required to Keep Informed on Lower Wholesale Rates

ONE of the major problems in the regulation of gas and electric utilities has been the interstate supply company. This sort of company has been called the "loop-hole of utility regulation" because, being interstate in character, the state cannot control its rates and Congress won't control its rates and so it goes thus far uncontrolled.

But how, the question is asked, can a wholesale supply company be the

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But how, the question is asked, can a wholesale supply company be the

means of evading state regulation as long as the local distributing operating utilities are subject to Commission scrutiny? The charge is made that the wholesale company, being controlled by the same holding company as the operating company, can pad its supply rates so that the distributing utility's loss is the supply company's gain, and the money all finds its way into the same pocket.

Whether this situation does actually exist to the extent of being an evasion of law and an oppression of the ratepayers is a rather debatable question. However, it is a fact that once a supply company makes a contract with a distributing utility as to rates, the Commission cannot, in regulating the rates of the latter, go into the reasonableness of the contract charge. Is there any remedy for this situation? So far attempted legislation has failed to clear the constitutional hurdles. The Colorado Commission seems to have found a way out, however, without the need of legislation.

Its action came as the result of an application by the Arkansas Natural Gas Company for a certificate to construct and operate a gas distribution plant in Las Animas and to exercise a 25-year franchise granted by the city. The applicant has a 20-year contract with the Colorado Interstate Gas Company which operates a pipe line between Amarillo, Texas, and Denver to purchase gas for its Las Animas plant at a specified rate per thousand cubic feet.

The Commission, after commenting on its lack of jurisdiction over the rates charged by the interstate pipe line company, stated:

> "Under the legal set-up, therefore, as we understand it, this rate structure for natural gas would practically be 'frozen' and unchangeable for approximately twenty years. If the applicant should at any time during these twenty years be able to obtain natural gas at materially lower charges than those required by the contract, it would be unable to put the same into effect unless this Commission in some manner would protect the public in the certificates herein granted.
>
> "To authorize a certificate that would practically require the same rates for natural gas for a period of twenty years would, in our opinion, be contrary to the public interest."

The Commission granted the authority upon the express condition that if the applicant could obtain natural gas of the same quality in the future at a lower price, it should be required to do so notwithstanding its 20-year contract. The order also directed the applicant to keep itself informed as to the availability of natural gas from other sources at a lower rate.

THE *supreme court of the District of Columbia, on January 31st, decided that a law prohibiting foreign corporations from owning stock of local utilities does not apply to foreign investment trusts. Further mention of this case will be made in the next issue.*

Public Utilities Reports

COMPRISING THE DECISIONS, ORDERS, AND RECOMMENDATIONS OF COURTS AND COMMISSIONS

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[October 24, 1929.]

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By the COMMISSION: This is the fifth contribution to the history of a controversy before the Public Service Commission arising at the city of Huntington over the question whether a public service natural gas company can be required to furnish service to a consumer who is already being supplied by another gas utility.

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Case No. 1614, Huntington Brick & Tile Co. v. United Fuel Gas Co. (December 4, 1926) 14 Ann. Rep. W. V. P. S. C. 159, 2 P. S. C. Decisions 430, P.U.R.1927B, 173.

Opinion of the Supreme Court of Appeals, United Fuel Gas Co. v. Public Service Commission (March 1, 1927) 103 W. Va. 306, P.U.R.1927C, 441, 138 S. E. 388.

First report of the Commission in this case (No. 1793), (June 3, 1929) Bulletin No. 119, P.U.R.1929D, 502.

Opinion of the Supreme Court of Appeals, Huntington Brick & Tile Co. v. Public Service Commission (September 17, 1929) — W. Va. —, 149 S. E. 677.

The controversy is unusual in that the utility from which the service is sought, as well as the utility which stands to lose a customer, stoutly resists the authority of the Commission to require it to furnish the service. Under normal circumstances a competing utility would jump at the chance of securing the patronage of a large manufacturing plant, and would not be concerned with the effect the loss of the customer's patronage would have on its rival. In this case, however, the corporation which at the outset of the controversy owned 51 per cent of the stock of the defendant utility from which the service is sought, also owned 98 per cent of the stock of the intervening utility already enjoying the patronage of the manufactory, and the rates of the latter utility were 5 cents higher than those of the competitor in effect owning its stock.

A brief review of the proceedings is necessary to an understanding of the order now to be made.

In Case No. 1614 the defendant United Fuel Gas Company, over its protest and that of the intervening defendant Huntington Development and Gas Company, was required by an order made by the Commission December 4, 1926, *supra*, to furnish Huntington Brick & Tile Company with a supply of natural gas at its manufacturing plant in Huntington, although the plant was then being served by Huntington Development & Gas Company, but at a cost of 5 cents per thousand cubic feet in excess of the rates of the United Fuel Company. Huntington Brick & Tile Co. v. United Fuel Gas Co. (December 4, 1926) *supra*. That order was reversed by the supreme court of appeals as erroneous in law, unjust, arbitrary, and contrary to right and justice. The complaint of the Brick company was wholly dismissed by the Court. United Fuel Gas Co. v. Public Service Commission (March 1, 1927) *supra*.

The complaint in the present case was subsequently made by the same complainant against the same defendant, and seeks the same relief sought by the complaint so dismissed by the court in Case No. 1614. The Development Company intervened as before to resist the losing of a customer, and H. R. Wyllie China Company intervened as a complainant also seeking gas service from the Fuel Company although it, too, was being served by the Development Company. While there are some additional facts shown in the present record, the controlling facts and circumstances are not substantially different from the facts shown in the former case. Indeed the gas com-

panies relied for their defense in this case upon the record in Case No. 1614 which was made part of the present record. They also advanced the doctrine of *res judicata,* which was disposed of, so far as the Commission was concerned, with the statement in its report that "this Commission is not a judicial tribunal although many of its functions are quasi judicial; its orders are not judgments; its findings of fact are not adjudications; and facts found by it are not *res judicata.*"

Having found the controlling facts and circumstances the same in both hearings before the Commission, and out of that deference to the opinion and order of the supreme court of appeals in Case No. 1614 which is due the court in all cases, we made an order in this case June 3, 1929, *supra,* dismissing the complaints of the Brick Company and the China Company and denying their applications for gas service from the Fuel Company. (Bulletin No. 119).

That order was likewise set aside by the court, the syllabus reading: "The doctrine of *res judicata* does not prevent a re-examination of the same question between the same parties when, subsequent to the judgment, facts have arisen which may alter the rights of the litigants." Huntington Brick & Tile Co. v. Public Service Commission (September 17, 1929) *supra.*

The complaints are again before the Commission, having been remanded by the court with direction to determine the case on its merits. The mandate of the court is before us.

In our report in Case No. 1614 we ventured the observation that the duty of a public service gas company to serve the public with gas along its entire line is too well known to require it to be discussed here, and we adverted to the language of the court in Clarksburg Light & Heat Co. v. Public Service Commission (1919) 84 W. Va. 638, P.U.R.1920A, 639, 646, 100 S. E. 551, where it is said that the very essence of public service duty lies in the proposition that "not only must the service offered be available to any one who applies for it, but any one who desires it must have the right to demand it upon complying with the proper regulations, and the payment of proper charges therefor." With this principle in mind, there have been but two questions to be decided in this case upon its merits and agreeable to the law in force in West Virginia:

(1) *Whether the application of the two manufacturing concerns for gas service constitutes a reasonable demand upon the aforesaid primary public service obligation of the Fuel Company.*

(2) *If the demand for such service is a reasonable one, whether the law of this state, by legislative enactment or judicial interpretation, has undertaken to protect the Development Company from the competition which otherwise exists by virtue of both utilities enjoying municipal franchises to sell natural gas for domestic and industrial purposes to the inhabitants of the city of Huntington.*

It goes without saying that an application for service must be reasonable. The applicant must have just grounds for requiring the service, and the utility must be shown to be in

position to render it without unreasonable cost to it; otherwise the application should be denied. The duty of a public service corporation to serve all who may require its service is frequently modified by the economic situation attending the proposed service. It can not be enforced at the whim or caprice of the customer, or upon his arbitrary demand at the expense of other customers.

(1) Reasonableness of Request for Service

[1] Upon the first of these questions in the initial hearing of this controversy (Case No. 1614), the Commission found from the evidence as follows:

The application for service was made in good faith, based on the fact that the Fuel Company's rates were 5 cents per thousand cubic feet lower than the rates of the Development Company; the Fuel Company operates a high pressure gas main along and through the Brick Company's property and the cost to the Fuel Company of installing the service will not exceed $700; the Fuel Company has a large surplus of gas, and is able from its present supply to furnish the service; the request for service is, therefore, a reasonable one to be made of a public service corporation whose primary duty it is to serve any one who desires it upon his complying with the proper regulations and paying proper charges therefor.

The court did not approve that conclusion in its review of that case. It disclaimed any attempt "to invade the right of the Commission to investigate the facts," but it found that the Fuel Company "is not personally in a position to serve the complainant without the expenditure of large sums of money for increased supply [of gas] and facilities." It estimated these "large sums of money" at $750 to make the connections required to render the service, and $550,000 to equip the utility to supply gas to the Brick Company alone.

With the utmost deference for that finding, but in obedience to the present mandate of the court requiring us to determine this case on its merits, constrained by our duty as a fact finding body to follow a conscientious judgment fairly arrived at, and having by a unanimous report in this case on June 3, 1929, P.U.R. 1929D, 502, reached the conclusion that the facts presented now are not substantially different from those presented in the earlier hearing, we are of opinion that the applications of both the complainants for gas service from the defendant United Fuel Gas Company are reasonable, as hereinafter set out, and that they constitute a lawful exercise of the right of the complainants to demand service from that public service corporation. Moreover, on this question of the reasonableness of the demand for service, the court, upon the recent review of the order of June 3, 1929, *supra*, appears to have agreed with our conclusion. The court says: "During the first five months of 1928 United Fuel Gas Company had gas largely in excess of the requirements of its domestic and industrial customers. . . . The pipe lines . . . are within a few feet of the plants of the applicants. The Wyllie Company offers to make connections with that line at its own expense. The cost of

connections in the case of the other applicant will be only about $750." (149 S. E. at p. 678).

The court having now approved of the Commission's finding made in December, 1926, upon the reasonableness of the demand for service, it is unnecessary to discuss the question further.

(2) Protection Against Competition

The second question, that of protection against competition between two gas utilities already authorized by municipal franchises to carry on business in the same community, is a question of law. Here the Commission could not escape the exercise of its "quasi judicial function" of undertaking to apply to a given state of facts the law as enacted by the legislature and expounded by the court.

[2] The gas companies contended that one of the principal purposes of state and federal regulatory statutes is to prevent unnecessary duplication of plant and facilities, unjust burdens upon the public resulting therefrom, and ruinous competition between persons and corporations employed in the public service. This contention was given careful consideration, for it was the chief reliance of the defense in argument by brief in the first case. However, we failed to find that our legislature had directly or by implication lodged in the Public Service Commission power to provide protection for one utility against competition from another when both utilities had been legally authorized to do business in the same territory.

[3] The state's authority to prevent competition in utility service, in the interest of the public to be served, can not be exercised effectually except at the time of the installation of the facilities and the inauguration of the service. In many jurisdictions that power is delegated to the state regulatory commission, as evidenced by cases cited by counsel. Our legislature, however, has lodged exclusive power in municipal councils and county courts to grant or refuse franchises to natural gas pipe line companies, and to other utilities. That authority carries with it a sound discretion as to the public necessity and convenience to be served by one or a dozen utility concerns offering the same service. When that discretion is exercised by granting a franchise to one utility and refusing all others, the result is a complete monopoly and perfect protection from ruinous competition and economic waste, in accordance with the ultimate theory of state regulation. On the other hand, when the municipal authority which has been exclusively designated by the legislature to exercise that sound discretion, does exercise it in the determination that the public interest is better served by the granting of franchises to two gas companies, as was the case in this instance, then the legislative intent as expressed by the municipal agent is not manifest to protect either utility from the competition of the other. And the Development Company having voluntarily sought and accepted a junior franchise, can not now be heard to complain. Moreover, it can not complain to a Commission which had no part in creating the situation in which it finds itself, and which has no authority from the legislature to remedy it.

In the review of Case No. 1614, the court, for reasons set out in the majority opinion, took the view that not only was the granting of the application of the Brick Company an unjust burden on the United Fuel Gas Company but the interests of the owners of the 2 per cent minority stock of the Huntington Development & Gas Company invoked the theory of protection against competition for which the gas companies contended. However, upon the later review, the inhibition against requiring the service, so sharply stated in the first opinion, has been removed, and we are directed to determine the case on its merits. Thus we happily escape the task of attempting to decide in this case whether the duty devolves upon the Public Service Commission or upon the municipality that grants a franchise to determine if there shall be competition in public utility service in a particular city. That question may be met hereafter by the Commission and decided by the court when some thrifty ratepayer undertakes to transfer his patronage from a high rate utility to a competitor in position to render the service at a lower rate which is willing to do so, provided the utility that is threatened with the loss of a customer shall have sufficient confidence in the doctrine to invoke the judgment of the court upon it.

Findings on the Merits

Upon consideration of the whole record in this case, the Commission is of opinion and finds as follows:

1. The applications of Huntington Brick & Tile Company and H. R. Wyllie China Company for natural gas service from United Fuel Gas Company, and each thereof, are made in good faith, based on the fact that the rates for such service offered by said United Fuel Gas Company are lower than the rates offered by the intervening defendant, Huntington Development & Gas Company, which has heretofore served said complainants.

2. The defendant Fuel Company operates a high pressure gas main along and through the property of said Huntington Brick & Tile Company and the cost of installing the service sought by the latter company will not exceed $700, and the said defendant operates a gas line along the property of said H. R. Wyllie China Company which offers to pay the cost of installing its said service.

3. The defendant Fuel Company has a large surplus of gas, and is able from its present supply to render the said service.

4. The said applications, and each thereof, are, therefore, reasonable demands to be made upon the defendant Fuel Company, and it is the duty of that company to furnish the said complainants with gas upon its usual terms, notwithstanding the intervening petition of Huntington Development & Gas Company alleging that it is protected by statute from competition at the hands of the Fuel Company.

The mandate of the court will be recorded, and an order will be made granting the prayer of the original and intervening complaints.

It is noted of record that Commissioner Divine, being necessarily absent from the capitol, did not participate in the making of the foregoing report.

Denver Colorado Springs Pueblo Motor Way

v.

Michael P. Masterson

[Case No. 469, Decision No. 2616.]

Automobiles — Illegal operation — Responsibility for acts of agent.

1. Any improper and unlawful conduct in the operation of a bus utility by an agent after the principal has knowledge of such conduct will be imputed to the principal, p. 327.

Automobiles — Illegal operation — Employees.

2. The operator of a motor carrier service should exercise care in selecting agents instructing them properly as to any refunds or rebates which are unlawful, p. 327.

[November 6, 1929.]

COMPLAINT *by one motor carrier against alleged illegal operations of another; complaint dismissed.*

APPEARANCES: Thomas R. Woodrow, Denver, attorney for applicant; Elson S. Whitney, Denver, for respondent; Colin A. Smith, *amicus curiae.*

By the COMMISSION: [1, 2] This is an application to cancel and revoke certificate of public convenience and necessity of Michael P. Masterson, doing business as the Masterson Auto Service Company, for improper conduct in this that the authorized operator sold transportation at rates lower than specified in his tariffs on file with this Commission. The evidence briefly is that arrangements had been made for transportation of a party of ten by the applicant on a motor sightseeing trip from Denver to Pikes Peak and return. The tariff rate is $10 per person. Somewhat prior to the time of departure the applicant was advised that this party of ten could not make this journey because it was required to leave Denver for another destination that morning. The manager for the applicant company thereupon made investigation and found that that was not true. The investigation showed one William Gould, agent at the Loma Hotel for the respondent, sold the same party of ten transportation to Pikes Peak and refunded $20, thereby making the rate $6 per person instead of the legal tariff rate of $10 per person. Agent Gould testified that he returned $20 of the $100 to persons representing the party, but did not advise his prin-

cipal, the respondent herein, of this transaction; that he was entitled to 20 per cent as his commission for the sale of these tickets, but waived this commission because of some hotel business that was brought to him by this party; that the respondent was not advised of this transaction and that it was done without his knowledge or consent. Respondent also testified that he did not have any knowledge of this transaction; that he received $80, which was his share of the transportation charge and did not learn of this transaction until some time after it was being investigated. There is nothing in the record from which the Commission can find that the respondent had knowledge of this transaction. The Commission is not satisfied, however, with the conduct of the respondent after ascertaining these facts. He should have immediately discharged this agent. The retention of the agent tends to show his conduct was agreeable to the principal. Any improper and unlawful conduct by an agent after the principal has knowledge of such former conduct will be imputed to the principal. Moreover, the respondent should exercise considerably more care in selecting his agents and instructing them properly as to any refunds or rebates which are unlawful. The Commission will expect the respondent in the future to instruct emphatically all of his agents against such unlawful practices as are herein involved and not to have the said Gould act as agent again for him.

Upon the record as made the Commission will not cancel the certificate of the respondent, but will reserve the right in any further complaint of a similar nature to make the record herein a part of such proceedings.

ORDER

It is therefore *ordered,* that this case be, and the same is hereby, dismissed.

SOUTH DAKOTA BOARD OF RAILROAD COMMISSIONERS

Re Northwestern Bell Telephone Company

[F-1236.]

Valuation — Comparison — Labor costs — Telephones.

1. Notwithstanding the possibility of dissimilarity in local conditions in comparing the value of a telephone plant with other similar exchanges, the Commission failed to find justification for valuing the labor costs on certain construction at an amount three or four times the amount of similar construction installed by similar exchanges, p. 329.

Rates — Reasonableness — Comparison — Telephones.

2. Notwithstanding the admitted possibility of dissimilarity in local conditions between a telephone plant when compared with other exchanges, the Commission failed to find any justification for rates higher than charges

made by exchanges in cities two or three times as large as the community in which the plant involved was located, p. 329.

Rates — Reasonableness — Comparison.

3. A showing of the actual effective rates charged for service in a majority of all communities of a similar size was held to be indicative of approximately a proper level, when applied to a given exchange or at least of a level beyond which the schedule should not be permitted to go, p. 329.

Rates — Telephone — Higher type of service — Public demand.

4. A telephone company was authorized to put into effect a schedule of rates sufficient to permit the use of a higher class of service where no opposition was offered by the city or subscribers and where to the contrary there was evidence of some public demand favoring the higher class of service, p. 331.

Rates — Reasonableness — Value of service — Telephones.

Discussion of the effect of the value of telephone service meeting the needs of a particular community on the reasonableness of rates to be fixed therefor, p. 330.

[November 14, 1929.]

APPLICATION *of a telephone company for authority to increase rates; rates adjusted.*

APPEARANCES: A. J. McBean, Attorney, for the applicant; H. T. Chaney, Secretary, for Belle Fourche Commercial Club.

By the BOARD: In this case, the Board, on May 11, 1929, filed its report containing its findings of fact and conclusions thereon, together with its order. On June 10th following, the applicant company filed an application for rehearing, and the matter was set for rehearing and heard at Belle Fourche on September 10, 1929.

In its application for rehearing, the company set forth an assignment of errors and asked that the entire matter be reopened, and it be permitted to introduce new evidence in support of its proposals. By stipulation the record made at the original hearing was incorporated and included in the record of the rehearing. In our original report we stated that the investment in and value of the property as claimed by the company were unusually high, when compared with the investment in or value of property installed at other and similar exchanges. The company, at all stages of the proceedings, offered objections to any consideration being given to comparisons with other exchanges, apparently basing its objections upon the ground that conditions in the compared exchanges are dissimilar, or at least not shown to be similar to the conditions existing in the exchange under consideration.

[1–3] While it may be conceded that any exchange of the same size and type would show some dissimilarity as to conditions, which would result in some difference in cost, and there might be dissimilarities that

would result in an extreme difference in cost, it is rather difficult for one fairly conversant with the actual installation costs of different elements of property going into the construction of telephone exchange plant in all parts of this state, to understand where the dissimilarity exists that would justify one company in including in its valuation, in connection with the installation of a ten pin cross-arm, labor costs three or four times the labor cost of an exactly similar cross-arm, the latter installation being made by another company. The company also objected seriously to the Board giving weight to rates charged for telephone service at other exchanges, whether the compared exchanges were owned and operated by the applicant company or by other companies, its objections in this respect apparently being based upon a dissimilarity of conditions. Even if it were to be conceded that there be some dissimilarity of conditions at Belle Fourche, in so far as the furnishing of telephone service is concerned, compared with the conditions existing at other towns or cities, we are unable to find anything in this record that would justify the approval of rates higher than the rates charged at cities or exchanges two or three times as large as the exchange at Belle Fourche, and while it may be true that a comparison of rates is not an absolute criterion to go by, it would appear that a showing of the actual effective rates charged for service in a majority of all of the towns or cities of a similar, or even larger size, would be indicative of approximately a proper rate level, when applied to a given exchange, or at least should be indicative of a rate level beyond which a schedule should not be permitted to go.

The company also contended that the Board erred in its original report in determining that because there was a discrepancy between the number of stations shown in the applicant's revenue estimate and the number shown in its appraisal, the revenue estimate should be increased by computing revenue for the additional number of stations shown in the appraisal; that the revenue estimate included all of the revenue producing stations which the applicant had, but that the applicant has, and will continue to have, some telephone stations at Belle Fourche which produce no revenue, but which represent additional plant investment and must, therefore, be included in an appraisal; and that the Board erred in its conclusion that any business which may be taken on by the applicant without substantial additional investment, because of the anticipated needs included in its appraisal, would result in a return much higher than testified to by applicant's witness. In regard to these contentions, it is deemed sufficient to say that if the company does not believe that there will be a substantial growth of business at Belle Fourche, it has asked to be included as a part of the valuation to be used as a rate base a very liberal allowance to cover the cost of unnecessary station facilities.

The applicant also claims error by the Board in implying that sufficient consideration was not given by the company to the value of the service and to the question of whether the proposed rates would retard develop-

ment. In this connection, we said in the original report:

"In determining the type of service that should be provided, it would appear reasonable that some consideration be given to the value of the service as well as to the rate to be charged therefor. If on account of the size of an exchange, or for any other reason, the installation of a particular type of service would make necessary the imposition of rates that would retard development, or exceed the value of the service to many subscribers, the situation would appear to demand that most careful consideration be given by the company and its subscribers as to whether or not the change in the type of service should be inaugurated."

It will be noted from that part of the report quoted above that we did advise not only the company, but its subscribers, that when a change in type of service is under consideration, it would appear reasonable that some consideration be given to the value of the service, and it was our hope that it would be inferred that the subscribers of the company and the representatives of the city of Belle Fourche and its commercial organization, would give some consideration, not only to the desirability of having a high type of service installed, but some consideration to the welfare of many of its citizens that might find it burdensome to have imposed the higher level of rates made necessary by the installation of the more costly type of service. It is natural, perhaps, for every one to desire the highest standard of service. We believe, however, it is equally true that it is in the public interest that a type of plant that will provide adequate and efficient service is the type that should be provided, and where, because of the small size of the city, or for any practical reason, the installation of a particular type of plant, whether common battery or automatic, will result in rates either prohibitive or particularly burdensome, the people to be served, should consider well before making demands for such class of service, and the company furnishing the service should not encourage such installation.

[4] At the rehearing the company offered some additional testimony in support of its position. On the other hand, no testimony was offered by the representatives of the city, its commercial club, or by the subscribers in opposition to the granting of the application. The secretary of the commercial club testified specifically that it was the desire of the people he represented that the application be granted. Subsequent to the date of the rehearing, a formal resolution, signed by the mayor of the city of Belle Fourche, and attested by its auditor, was filed with the Board, from which resolution we quote as follows:

"*Whereas,* the people of Belle Fourche are more interested in getting the improved service as soon as possible than they are in the slight differences in rates, and

"*Whereas,* the rates of the telephone company are subject to investigation at any time by the Board of Railroad Commissioners and can be reduced if future experience shows that they are too high;

"*Be it resolved* by the Board of Commissioners that the city of Belle

Fourche go on record as favoring the immediate approval by the Board of Railroad Commissioners of the schedule of rates applied for by the telephone company, with the understanding that the new rates will not go into effect until the new system has been installed, and with the further understanding that the company will begin work on the new system as soon as the rates which it has applied for have been authorized by the Board of Railroad Commissioners."

Upon the entire record and all the information before the Board, including the express demand of the city council of the city of Belle Fourche, as set forth above, we are of the opinion and find that an order should be entered authorizing the company to place in effect the rates applied for, said rates to become effective on and after the first day of the month following the date on which the town subscribers of the exchange in Belle Fourche are furnished common battery telephone service.

Let an order be entered accordingly.

INDIANA PUBLIC SERVICE COMMISSION

Re Home Telephone Company of Portland

[Cause No. 9716.]

Rates — Franchises — Jurisdiction of municipality.

1. A clause contained in a section of a franchise granted to a telephone company reserving to a city certain police powers was construed not to govern rates, in view of the law of the state delegating jurisdiction over such matters to the Commission, p. 336.

Rates — Regulation by municipal authorities — Telephones.

2. The acts of the common council of a city in passing an ordinance fixing rates for telephone service under cover of a franchise purporting to reserve to such city certain police powers was held to be without authority of law and void, p. 336.

Rates — Jurisdiction of the Commission — Attempted regulation by a municipality.

3. The Commission, having authority of law to fix the rates for telephone service in municipalities and elsewhere within the state, proceeded to the adjustment of rates for such service in a city notwithstanding attempted regulation by local authority, p. 336.

[November 14, 1929.]

PROCEEDINGS *to determine the jurisdiction of the Commission to hear a petition of a telephone company for increased rates; jurisdiction resolved in favor of the Commission and proceedings ordered to continue.*

McINTOSH, Commissioner: On April 10, 1929, the Home Telephone Company of Portland, Indiana, filed its petition in Cause No. 9716 to increase rates for telephone service at Portland, Indiana.

After due and legal publication a hearing was set on said petition at Portland, Indiana, September 4, 1929.

At said hearing the city of Portland, by its Attorney James R. Fleming, objected to the Commission proceeding further with the hearing on the ground that jurisdiction over all matters involved in this cause lies with the city of Portland and not with the Public Service Commission of Indiana.

The city of Portland offered in support of its position the statement that the Home Telephone Company, the petitioner in this cause, had been and was then operating under a franchise granted by the city of Portland.

The petitioner admitted that it was operating under a franchise granted by the city of Portland, and that it had never surrendered such franchise and had not been granted an indeterminate permit. The petitioner claimed that the franchise did not stipulate that any particular rates should be charged. The petitioner further claimed that the city waived its rights, if any it had, of rate fixing by not protesting the jurisdiction of the Commission at a former rate hearing by the Public Service Commission. The petitioner avers that the city did not then, nor has it since, complained of any act of the Public Service Commission in fixing rates at the former hearing and taking jurisdiction of matters involved therein. The petitioner avers that not until this petition came up for hearing did the city of Portland claim any jurisdictional rights so far as rate fixing is concerned under the franchise.

The hearing Commissioner set September 27, 1929, for oral argument on the question of jurisdiction in this case. It was ordered that the franchise be presented at the time of this argument. On September 27, 1929, all parties appeared at the hearing room of the Commission. A copy of the franchise was then and there presented.

Prior to the date of this argument the attorney for the city of Portland had filed a brief in this cause. On September 27, 1929, said attorney filed, in lieu of his brief, his second paragraph which among other things avers:

"That on or about the 21st day of January, 1895, the city of Portland, Indiana, entered into a certain franchise contract with the Portland Telephone Company, whereby among other things the city of Portland, Indiana, granted to the Portland Telephone Company the right to erect and maintain on the streets and alleys and public highways of said city, the poles, fixtures, and wires necessary for the purpose of supplying the citizens of said city and the public, communication by telephone or other improved electrical device; and that in said franchise contract, and as a part of the same, it was expressly provided and contracted between the parties thereto that said grant was made and was to be enjoyed subject to such reasonable regulations and ordinances of police nature as said common council is authorized and sees proper at any time to adopt, not

destructive to the rights therein granted," a certified copy of which franchise is filed herewith, made a part hereof, and is marked Exhibit A.

Said second paragraph further contains this statement:

"This answering defendant would further aver that said franchise contract contained no provision fixing the maximum rate for telephone service to be charged its patrons by said grantee or its assigns under said franchise contract but that said franchise contract expressly reserved to said city of Portland the right to adopt reasonable regulations and ordinances of a police nature such as said common council of the city of Portland, Indiana, might deem proper at any time to adopt; and that on the 23rd day of September, 1929, the common council of the city of Portland, Indiana, in the reasonable exercise of its police power under the terms and provisions of said franchise and under the powers expressly reserved to it under said franchise, duly and legally enacted an ordinance fixing and declaring the following to be maximum rates for telephone service to be charged by said petitioner, the Home Telephone Company, under its said franchise, to its patrons within the corporate limits of the city of Portland, Indiana, as follows to wit:—

Single party business telephone, net $2.75 per month. Gross $3.

Two-party business telephone, net $2 per month. Gross $2.25.

Single party residence telephone, net $1.75 per month. Gross $2.

Two-party residence telephone, net $1.50 per month. Gross $1.75.

"A certified copy of which ordinance is filed herewith, made a part hereof and is marked Exhibit B.

"This answering defendant would further aver that the Public Service Commission of Indiana is without jurisdiction and power to grant the petition of said petitioner for the following reasons to wit:—

"1. That the jurisdiction and power to fix rates for telephone service under said franchise was expressly reserved to the common council of the city of Portland under its said franchise and that when it exercised its power on the 23rd day of September, 1929, and fixed a maximum rate for telephone service under said franchise, its action was final, unless proper resort to the courts is had by said petitioner.

"2. That the granting of said petition would violate Article 1, § 24 of the Constitution of the state of Indiana which provides that no law impairing the obligation of contracts shall be passed.

"3. That the granting of said petition would violate § 10, Article 1 of the Constitution of the United States which provides that no state shall pass any law impairing the obligation of contracts.

"4. That neither the General Assembly of Indiana nor the Public Service Commission has jurisdiction or power, under existing laws to impair the obligation of the franchise contract now existing between the city of Portland and the Home Telephone Company as set forth in said Exhibit A.

"Wherefore this answering defendant says that the petition of said Home Telephone Company for an in-

crease in rates should be in all things denied."

On October 17, 1929, the petitioner in this cause filed its brief in answer to the city of Portland on the question of jurisdiction. The petitioner's brief in part is as follows:

"On the 21st day of January, 1895, the city of Portland, Indiana, passed an ordinance the title of which is as follows:

"An ordinance granting to Portland Telephone Company the right to place and maintain its poles and lines in the streets and alleys in the city of Portland, Indiana, on the terms and conditions therein stated."

Thereafter, in 1902, this ordinance was assigned and transferred to Home Telephone Company of Portland, Indiana, and Home Telephone Company of Portland, Indiana, has no other franchise from the city of Portland and the records fail to disclose that the same has ever been surrendered and an indeterminate permit taken in lieu thereof.

Home Telephone Company of Portland, Indiana, contends:

1. That the so-called "reservation" relates solely to the question of the placing and maintaining of poles and lines in the streets and alleys in the city of Portland.

2. If the power to either fix a rate as a condition precedent to the use of streets, or to regulate rates had ever been delegated to municipalities, the same was withdrawn by the Spencer-Shively Utility Act of 1913.

Wherein on a petition of Home Telephone Company the Public Service Commission of Indiana assumed jurisdiction and increased the rates.

I.

"The franchise ordinance is composed of seven sections, the third section being relied upon by the city of Portland to sustain its contention which is, that the city alone has the power to regulate rates for this utility under the franchise in question. For the convenience of the Commission, a copy of that franchise is attached hereto and made a part hereof. The section relied upon by the city of Portland, is as follows:

'Section 3. —Said poles and wires shall be placed and maintained so as to not interfere with the travel on said highway and said company shall hold said city free and harmless from all damages by reason of said occupancy. This grant is made and is to be enjoyed subject to such reasonable regulations and ordinances of police nature, as said common council is authorized and sees proper at any time to adopt, not destructive of the rights herein granted.'

"It is respectfully submitted that that part of § 3 which reads:

'Subject to such reasonable regulations and ordinances of police nature, as said common council is authorized and sees proper at any time to adopt, not destructive of the rights herein granted.'

Relates to the first sentence of § 3 which is as follows:

'Said poles and wires shall be placed and maintained so as to not interfere with the travel on said highway and said company shall hold said city free and harmless from all damages by reason of said occupancy.'

This view is strengthened by the

fact that the title to the ordinance is as follows:

'An ordinance granting the Portland Telephone Company the right to place and maintain its poles and lines in the streets and alleys in the city of Portland, Indiana, on the terms and conditions therein stated.'

The 'reasonable regulations and ordinances of police nature' refer to regulations and ordinances concerning the power to place and maintain poles and lines in the streets and alleys of the city of Portland and to nothing else. There is not the slightest suggestion at any place in the franchise from which it could be inferred that the common council of the city of Portland had in mind at any time the question of rates, (if it be conceded that the city of Portland had the right to exact the fixing of a price in a contract as a condition precedent to permitting the use of the streets by this utility.)

"If the council of the city of Portland had in mind the question of rates, there would undoubtedly have been some suggestion contained in the franchise. A careful examination of this entire franchise reveals no mention of rates. All of the ordinance preceding the so-called 'reservation' relates solely to poles and lines in the streets and alleys in the city of Portland. The common council of the city of Portland cannot be said to have been ignorant of the fact that where the power had been delegated to municipalities to fix rates in a contract as a condition precedent to the use of the streets, that rates had been inserted.

"It is respectfully submitted that the so-called 'reservation' contained in § 3 of said ordinance cannot possibly draw to the city of Portland powers greater or different than it possesses without the so-called 'reservation' and if the city of Portland had no right to regulate rates without the so-called 'reservation,' it has none by virtue of the so-called 'reservation.'

II.

"It is submitted that the city of Portland can find no authority whereby municipalities were authorized to fix a rate in a franchise contract as a condition precedent to permitting the use of streets for telephone purposes.

"The law of Indiana warrants the conclusion that municipalities are without the power to require the fixing of a rate in a franchise contract as a condition precedent to permitting telephone companies to use streets, unless such right has been delegated to municipalities by the legislature.

"It must be borne in mind that the franchise in question was granted in the year 1895. From and after the year 1899 then to and including the year of 1904, no statute delegated the powers to municipalities 'to prescribe the terms and conditions of such use and to fix by contract the price to be charged to the patrons.' "

[1–3] It appears evident that the main "bone of contention" between parties in this cause lies in § 3 of the franchise. This paragraph contains the reservation which the city makes for granting the franchise. The reservation is:

"This grant is made and is to be enjoyed subject to such reasonable regulations and ordinances of police nature as said common council is au-

thorized and sees proper at any time to adopt, not destructive of the rights herein granted."

The evidence connected with the matter of jurisdiction in this case having been duly considered, the findings of the Public Service Commission are as follows:

1. The Home Telephone Company of Portland, Indiana, a public utility, is and has been since its organization operating under a franchise granted by the city of Portland, Indiana, and that said company never received an indeterminate permit.

2. That the reservation of police power contained in § 3 of the franchise should not be construed to govern rates.

3. That the act of the common council of the city of Portland in passing an ordinance on the 23rd day of September 1929, fixing certain rates for telephone service in the city of Portland being without authority of law is void and of no force and effect.

4. That the Public Service Commission of Indiana has by authority of law jurisdiction over telephone rates in municipalities and elsewhere within the state of Indiana. The city of Portland had notice of this attitude of the Public Service Commission by its having witnessed a rate hearing in the city of Portland. This occurred some nine years prior to the hearing on the present petition. See Order No. 4776, February 9, 1920.

5. Upon the findings above set out it is the purpose of the Public Service Commission to proceed with the adjustment of rates for telephone service in the city of Portland under the petition filed in Cause No. 9716.

McCardle, Singleton, Ellis, and West, Commissioners, concur.

INDIANA PUBLIC SERVICE COMMISSION

William H. Claybourne et al.

v.

Northern Indiana Power Company

[No. 9741.]

Service — Commission jurisdiction — Extension of railway service.

1. The Commission has jurisdiction to compel the extension by a street railway of service over tracks, poles, wires, and other equipment already in place in a city and occasionally used by the company, without a prior application to the city council, p. 341.

Service — Notice to municipality — Street railway extension.

2. A city council was held to have taken official knowledge of a petition by certain citizens for an extension of street railway service before the Commission by the appointment of a committee to report on such mat-

ters, notwithstanding the absence of a formal petition to the council, p. 341.

Service — Street railways — Use of equipment.

3. The Commission overruled a motion by a street railway company to dismiss a petition of certain citizens for the extension of street railway service over a part of its system not formerly used in such service where the requested operations were to make use of track, poles, wires, and other equipment already in place and owned by the utility, p. 341.

Services — Street railway — Busses or cars — System already in use.

4. A street railway was ordered to extend either rail or bus service to a community of more than 120 families between certain peak hours where the track and other equipment needed for the operations were already in place and under the control of the utility, p. 341.

Monopoly and competition — Duty of street railway.

5. A street railway should be protected in its field from detrimental competition but should in turn protect the field from competition by rendering service to such parts of the field as reasonably need the same, p. 341.

(McCardle and Ellis, Commissioners, dissent.)

[November 16, 1929.]

PETITION *of certain citizens for the extension of street railway service; service ordered to be established.*

APPEARANCES: O. C. Phillips, Kokomo, for petitioners; Fesler, Elam and Young, by J. W. Fesler, Indianapolis; Glenn Van Auken, Indianapolis, and McClure and Elliott, by Mr. Elliott, Kokomo, for protestant.

SINGLETON, Commissioner: April 13, 1929, almost four hundred citizens of the southeastern portion of Kokomo, Indiana, filed with this Commission their formal petition which, omitting caption and signatures, is as follows:—

"We, the undersigned, resident citizens living and abiding in Southeastern Kokomo and beyond the city limits and contiguous thereto, hereby respectfully petition your Honorable Body for relief in matter of public transportation as follows:

"First: We have petitioned the Northern Indiana Power Company for an extension of their city car lines from Ohio street and Markland avenue (where their line terminates at this time) east along Markland avenue to Seventeenth street, a distance of six blocks.

"Second: That said petition was refused by said company.

"Third: That there are several hundred families living in said territory affected by said street railway extension.

"Fourth: That said extension and improvement is a public necessity to said body of resident citizens living in said territory affected.

"Fifth: That said service can be installed at very little cost to said street railway company for the reason that grades, roadbeds, and culverts

have already been established for said company's interurban lines running east and west along said Markland avenue road.

"Therefore, we petition your Honorable Body for an order compelling said Northern Indiana Power Company to extend its said city lines from Markland avenue and Ohio street, Kokomo, its terminal at this time, to Markland avenue and Seventeenth street."

In addition to residents of Kokomo other citizens of Howard county, whose residences were adjacent to the district seeking service, joined in the petition.

For the purposes of this cause, only the signatures of residents within the city of Kokomo will be considered as the signatures of competent petitioners herein.

The Commissioner to whom this cause was assigned attempted to secure an agreement between the petitioners and the respondent in order that the prayer of petitioners might be satisfied without formal public hearing. To this end one of counsel for the utility was informed that such petition had been filed and was requested to ask respondent to co-operate in an effort to reach the agreement suggested above.

Failing to receive response to the above suggestion, the request was repeated by the Commissioner. Again failing to receive response the utility was communicated with by telephone. The manager of the utility being absent, the request—that letter be written from the office on the following day—was complied with in the affirmative. Such letter was not received.

Following these efforts this cause was set for hearing in the city of Kokomo, Indiana, June 25, 1929. Due legal notice of the hearing was given, as required by law, and the hearing was held according to such notice.

After notice of hearing had been given, respondents on June 21, 1929, filed formal motion to dismiss the petition, which motion, omitting caption and signatures, is as follows:

"Northern Indiana Power Company, respondent herein, for answer to the petition respectfully shows:

"1. That said petition does not state that the subject matter of such petition has been presented to the city council of Kokomo, Indiana, for action and that said council has by ordinance or otherwise ordered said respondent to extend its lines as petitioned:

"2. Nor that such other steps have been taken as are required to be taken by the Shively-Spencer Act before a matter of the nature of that set forth in the petition may be presented to the Public Service Commission.

"Wherefore, respondent moves that the petition herein be dismissed."

At the beginning of public hearing protestant's answer and motion to dismiss were argued by counsel at considerable length. At the close of said argument the hearing Commissioner announced that the question involved was of sufficient importance to be brought before the entire membership of the Public Service Commission rather than to be ruled upon by one Commissioner. This suggestion was prompted by the fact that

the specific question of law involved in this petition, answer and motion of respondent had not been brought before the Commission for decision in such definite form as in this cause.

Thereafter evidence was heard, which evidence was introduced with the understanding that such hearing would be subject to determination by this Commission of the motion to dismiss. At the conclusion of the hearing, counsel for both parties were requested to submit briefs, and the request was agreed to. July 11, 1929, counsel for petitioner submitted his brief; July 20, 1929, counsel for respondent submitted brief; July 23, 1929, counsel for petitioner submitted his answer to respondent's brief; July 27, 1929, counsel for respondent submitted respondent's reply memorandum to petitioners' reply brief.

At the close of the hearing the Commissioner in charge suggested that the chief question involved in this cause is the legal question as to whether petitioner had followed the correct procedure under the law. If the motion to dismiss be sustained, evidence introduced will be of no avail; if said motion be denied, the evidence will be considered as presenting facts in a cause of action.

Section 1 of the Shively-Spencer Public Utility Act, paragraph 5, is as follows:

"The term 'service' is used in this act in its broadest and most inclusive sense and includes not only the use or accommodation afforded consumers or patrons but also any product or commodity furnished by any public utility and the *plant, equipment, apparatus, appliances, property, and facility employed* by any public utility in performing any service or in furnishing any product or commodity and devoted to the purposes in which such public utility is engaged and to the use and accommodation of the public."

Section 110 of said act is as follows, except that the proviso of said section is not included herein:

"Every municipal council shall have power, (a) to determine by contract, ordinance, or otherwise the quality and character of each kind of product of *service* to be *furnished* or *rendered* by any public utility furnishing any product or service within said municipality and all other terms and conditions not inconsistent with this act upon which said public utility may be permitted to occupy the streets, highways, or other public property within such municipality, and such contract, ordinance, or other determination of such municipality shall be in force and prima facie reasonable. Upon complaint made by such public utility or by any qualified complainant as provided in § 57 the Commission shall set a hearing as provided in §§ 57 to 71 and if it shall find such contract, ordinance, or other determination to be unreasonable, such contract, ordinance, or other determination shall be void. (b) To require of any public utility by ordinance or otherwise such additions and extensions to its physical plant within said municipality as shall be reasonable and necessary in the interest of the public, and to designate the location and nature of all such additions and extensions, the time within which they must be completed and all conditions under which they must be constructed subject to review by

the Commission as provided in subdivision (a) of this section. (c) To provide for a penalty for noncompliance with the provisions of any ordinance or resolution adopted pursuant to the provisions hereof. (d) The power and authority granted in this section shall exist and be vested in said municipalities anything in this act to the contrary notwithstanding: . . ."

[1–3] The purpose of the petition in the instant case is to secure service for the locality in which petitioners reside, over tracks and by the use of facilities now used by respondents in similar service.

The paragraph quoted above from § 1 of the act specifically states that "service" is used in its broadest and most inclusive sense and includes "equipment, apparatus, appliances, property, and facility employed by any public utility in performing any service," etc.

The facilities now used by the street railway company to serve the public must be extended in their use over additional trackage, now in active use, into territory not served regularly, if the prayer of the petition should be granted. Obviously, the definition of "service" in § 1 of the act is applicable to the requirement that would be necessary for compliance with the petition.

The Commission finds:

(1) That the petition seeks the extension of service, not the extension of track, poles, wires, etc.

(2) That track, poles, wires, etc., for the extension of the service sought are in place and used, on occasion, in service such as petitioners pray.

(3) That the extension of service is within the jurisdiction of this Commission, without petitioners applying to the city council in the first instance.

(4) That the city council took official knowledge of the case, in the absence of formal petition to said council, by the appointment of a committee on May 20, 1929, and by partial report of that committee on June 3, 1929, all as shown by the record of proceedings of the said city council.

Therefore, the Commission finds that respondent's motion to dismiss the petition should be denied, and it will be so ordered.

A formal opinion of the attorney general of Indiana, submitted for the purpose of this cause, is in complete accord with the above finding.

It remains to determine the merits of the case in view of the petition and in view of the service sought.

[4, 5] Having heard the evidence and being thereby duly advised, the Commission finds:

(1) That the Northern Indiana Power Company owns the only means of common carrier transportation available for use within the city of Kokomo.

(2) That facilities operated by said company in Kokomo consist of electric street railway and motor busses.

(3) That the Northern Indiana Power Company should be protected in this field from detrimental competition and should, in turn, protect the transportation field in Kokomo by rendering service to such parts of the city as need the service, provided the extension of service will not result in

an undue burden upon the remainder of the transportation system.

(4) That petitioners herein represent a community of more than 120 families who need street car or bus service in going to and from their places of employment.

(5) That only petitioners residing within Kokomo are proper petitioners herein.

(6) That public transportation facilities should be made available to these petitioners by the repondent herein at least between the hours of 6:30 A. M. and 8:30 A. M., 12:30 P. M. and 2:00 P. M., 5:00 P. M. and 7:00 P. M.

(7) That the street railway service, as now rendered to this community, is inadequate because of the distance petitioners must walk to and from street cars and because of crowding of street cars to the discomfort of these petitioners during peak periods.

(8) That respondent herein should be permitted to adopt either street car service or bus service during the hours suggested above, provided that bus service (if adopted) be operated with the same advantages, to patrons, of transfer, destination, and adequate frequency as street car service (if adopted) would afford.

The following pronouncement by the United States Supreme Court is applicable to the instant case:—

"The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders. This duty does not permit it to pick and choose and to serve only those portions of the territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give." United Fuel Gas Co. v. Kentucky R. Commission (1929) 278 U. S. 300, 73 L. ed. 390, P.U.R. 1929A, 433, 438, 49 Sup. Ct. Rep. 150.

In Cause No. 899-M before this Commission, the Peoples Motor Coach Company sought certificate of public convenience and necessity authorizing it to operate on North Meridian street in Indianapolis, for the transportation of passengers. At the time said application was filed, the proper authorities of Indianapolis had in effect an order prohibiting common carrier service on Meridian boulevard. The Commission believed then and believes now that the city has authority to forbid certain uses of certain designated streets. Therefore, the petition pending before this Commission was held in abeyance by the Commission pending action by the Board of Park Commissioners of Indianapolis as to whether its inhibition as to Meridian street would be withdrawn. This was done February 21, 1929, and this Commission was informed of such action. Thereupon this Commission granted the certificate prayed for by the Peoples Motor Coach Company.

In the instant case there is no such inhibition applicable to the streets that must be used by the service petitioned for in Kokomo.

The Commission believes that the prayer of the petition should be granted, and it will be so ordered.

McIntosh, West, concur; McCardle, Ellis, dissent.

ELLIS, Commissioner: I concur in the finding that the Commission has

jurisdiction over the subject-matter of the petition.

I dissent from the order requiring the extension of this service in view of the evidence in regard to the estimated speed of sixty miles per hour of steam railroad trains operating over tracks which it will be necessary for city street cars to cross. The extension of this service creates a hazardous condition for passengers on street cars, according to the evidence. No extension of service should be ordered until some steps are taken to regulate the speed of trains operating over this crossing.

INDIANA PUBLIC SERVICE COMMISSION

Re Decatur County Independent Telephone Company

[No. 9309.]

Pleadings — Commission procedure — Plea in abatement.

1. A petition by a city in a rate controversy with a telephone company framed in the nature of a plea in abatement was permitted to be filed and was regarded by the Commission as a petition to stay proceedings, notwithstanding the fact that the practice of the Commission was said not to be governed entirely by the rules of court procedure, p. 346.

Accounting — Abatement of proceedings for improper accounting.

2. Proceedings by a telephone company for increased rates were stayed on a petition by a city in the nature of plea in abatement until such a time as the company should put its books and records in proper order so as to reflect the findings and directions of a previous order of the Commission, p. 346.

[November 22, 1929.]

PETITION *by a telephone company for increased rates and petition in the nature of a plea in abatement filed by a city as objector; petition of city sustained in accordance with opinion herein.*

APPEARANCES: Cullen Barnes, Seymour, Rollin Turner of Tremain & Turner, Greensburg, John S. Powell, Indianapolis, and Walter T. Gurley, Indianapolis, for petitioner; Frank Hamilton, Terre Haute, for city of Greensburg; John Osborn, for Squire Dave Holmes, et al.

ELLIS, Commissioner: On April 23, 1929, the Decatur County Independent Telephone Company filed its supplemental petition in the above entitled cause. The matter was set for hearing by the Commission on several different dates but continued at the request of parties until November 18,

1929, at 10 o'clock A. M., Court House, Greensburg, Indiana. Legal notice of the time and place of said hearing was given as required by law. At the beginning of said hearing the city of Greensburg by its city attorney filed with the Commission what was styled "Petition by city of Greensburg to Abate Proceedings Until Petitioner shows Compliance with Order of Public Service Commission." Said petition, omitting caption and signatures, is as follows:

"Comes now the city of Greensburg, by Frank Hamilton, her city attorney, and moves the Public Service Commission of Indiana to abate further proceedings in the above entitled cause until the petitioner herein, Decatur County Independent Telephone Company, shows a compliance with the order of this Commission entered in the above entitled cause and approved on August 10, 1928, [P.U.R.1928E, 1] and in support of this motion, shows to the Commission the following facts to-wit:

"That on the 10th day of August, 1928, *supra,* this Commission duly approved and issued an order, granting to the Decatur County Independent Telephone Company, Greensburg, Indiana, an increase in rates, which said order was issued by said Commission after a hearing held on the 9th day of July, 1928, on a petition for such increase in rates filed by said Decatur County Independent Telephone Company on April 5, 1928; that said order of said Commission so issued as aforesaid, was duly promulgated by said Commission and to be effective as of September 1, 1928. That said Decatur County Independent Telephone Company accepted the increase granted in said order, filed a schedule of rates in conformity therewith with this Commission, and has been operating under such schedule of rates continuously since said 1st day of September, 1928, and is still so operating.

"That said order so issued, promulgated and approved as aforesaid, is now in full force and effect, and has never been appealed from by said Decatur County Independent Telephone Company or by any other person interested therein, and has never been altered, modified, or changed by the said Public Service Commission of Indiana, or by any court of competent jurisdiction.

"That as a part of said order aforesaid, the Commission made the following finding and order pertaining to the management of the business affairs of said Decatur County Independent Telephone Company, as shown by Finding No. 2 on page 11 of said order to-wit:

"(1) '2. The Commission further finds that officers' salaries of $450 per month is excessive, and that not to exceed $300 per month for such salaries shall be considered as an operating expense in determining and fixing the rates which petitioner is permitted to charge.'

"(2) That as a further part of said order, the Commission made the following finding and order, as shown by Finding No. 3 on page 12 of said order, to-wit:

" '3. The Commission further finds that rate case expense of a previous cause is not a proper item of expense to be amortized in the rates provided in this cause, and such items will not be allowed.'

"(3) As a further part of said order aforesaid, the Commission made the following finding and order, as shown in Finding No. 5 on page 12 of said order, to-wit:

" '5. The Commission further finds that $5,316.69 is reasonable rate case expense in this cause to be amortized over a 4-year period.'

"(4) As a further part of said order aforesaid, the Commission made the following finding and order with reference to the rate of depreciation, as shown by Finding No. 10, on page 12 of said order to-wit:

" '10. That the large balance in the reserve for accrued depreciation in petitioner's property, together with the amounts used by petitioner to meet depreciation requirements during recent years, more than warrant a rate of depreciation of not more than 4 per cent per annum.' (P.U.R. 1928E, at p. 14).

"The city of Greensburg further avers that since the issuance, approval, and promulgation of said order aforesaid, and the acceptance of the increase in rates therein provided for by said petitioner, Decatur County Independent Telephone Company, said petitioner, Decatur County Independent Telephone Company, has wilfully, knowingly, and purposely ignored each and all of the above provisions of said order. That notwithstanding the orders of this Commission, as above set forth, and as contained in the order of this Commission approved on August 10, 1928, *supra*, said Decatur County Independent Telephone Company has wholly ignored said provisions and continuously since the taking effect of said order, has violated the same in each of the following instances to-wit:

"1. That continuously since the 1st day of September, 1928, said petitioner herein, the Decatur County Independent Telephone Company, has paid to its executive officers the sum of $450 per month instead of $300 per month as specified and set forth in the order of said Commission.

"2. That said petitioner, Decatur County Independent Telephone Company, has wilfully, knowingly, and purposely ignored and violated the order of this Commission in amortizing rate case expense of a previous cause.

"3. That instead of amortizing the sum of $5,316.69 as a rate case expense in this cause to be amortized under a 4-year period, said petitioner, Decatur County Independent Telephone Company, has amortized the sum of over $12,000 as a rate case expense over a 3-year period, instead of four years, and instead of the amount specified in the order of this Commission.

"4. That said petitioner, Decatur County Independent Telephone Company, has knowingly, purposely, and wilfully violated the order of this Commission, as above set forth, in charging depreciation at the rate of 5 per cent per annum instead of 4 per cent, as authorized and ordered by this Commission, as above set forth.

"That the failure upon the part of the petitioner, Decatur County Independent Telephone Company, to observe and comply with the provisions of the order of this Commission, above set forth, has been wilfully and

purposely done upon the part of said petitioner, the Decatur County Independent Telephone Company.

"That by reason of the violation of the order of this Commission by said petitioner, Decatur County Independent Telephone Company, in each of the following instances aforesaid, it is impossible for this Commission to adjudge the gross income earned and received by the petitioner, Decatur County Independent Telephone Company, under the schedule of rates authorized by this Commission on August 10, 1928, P.U.R.1928E, 1. That the audit of the books of the Decatur County Independent Telephone Company as made by the auditing department of the Public Service Commission of Indiana, fails to reflect the true and correct result of the income received by the petitioner, Decatur County Independent Telephone Company, under the schedule of rates authorized by this Commission on August 10, 1928, *supra,* for the reason that such audit shows the result of an audit of books kept by said petitioner, Decatur County Independent Telephone Company, in violation of the order of this Commission in each of the instances above set forth. That said petitioner, Decatur County Independent Telephone Company, is not in position to ask this Commission to grant an increase in rates, until said petitioner has shown a good-faith effort to comply with the order of this Commission so made on August 10, 1928, *supra,* and until said petitioner is able to produce and audit showing its actual revenues received and earned by it under such schedule of rates as shown by the books and records kept by it in accordance with the provisions of the order of this Commission.

"*Wherefore,* said city of Greensburg asks and prays that all further proceedings in the above entitled cause abate until said petitioner, Decatur County Independent Telephone Company, has complied with the order of this Commission in each of the instances above specified."

[1] The practice of the Public Service Commission is not governed entirely by the rules of court procedure and there is nothing in the regulations of the Commission covering the filing of a plea in abatement. This pleading, however, will be regarded as a petition to stay proceedings in this matter.

The Commission heard the evidence on the petition to abate proceedings and then adjournment of the hearing was made for the consideration of such evidence. Transcript of such evidence has been prepared and considered by the Commission in connection with its decision in this matter.

[2] The Commission being fully advised in the premises finds as follows:

(1) That the books and records of the petitioner, Decatur County Independent Telephone Company, have not been kept so as to reflect the findings and directions of this Commission in the order in this cause approved August 10, 1928, *supra.*

(2) That the petitioner, Decatur County Independent Telephone Company, should adjust its books and records so as to reflect the findings and directions of the Commission in its order in this cause approved August 10, 1928, *supra.*

(3) That further proceedings in this matter should be stayed until finding number two set out above has been complied with and such compliance approved by the Public Service Commission of Indiana.

It is therefore *ordered* by the Public Service Commission of Indiana, that further proceedings in this matter be and they are stayed and held in abeyance until petitioner Decatur County Independent Telephone Company has complied with the findings set out above in this order.

MICHIGAN PUBLIC UTILITIES COMMISSION

Detroit Athletic Club

v.

Michigan Bell Telephone Company

[T-517.]

Rates — Athletic club — Telephones.

An athletic club not offering living accommodations to the public generally, but furnishing accommodations and meals to a number of members and guests of members, was held not to be entitled to a hotel rating for telephone service to the extent of being allowed a commission on outgoing toll calls, but was entitled to an existing rate classification for private branch exchanges in hotels or apartment house phones.

[November 13, 1929.]

COMPLAINT *by an athletic club against rate classifications by a telephone company; classification adjusted.*

By the COMMISSION: Complaint having been filed with this Commission June 10, 1929, by the Detroit Athletic Club, alleging that the Michigan Bell Telephone Company refuses to allow to Detroit Athletic Club the same commission on outgoing toll calls as is allowed the owners and operators of hotels for a like service, and petitioning this Commission for an order granting such relief in the premises as may seem right and fair, and the same having come on to be heard pursuant to the order of hearing issued herein on June 24, 1929, and the testimony of the parties having been heard and due consideration thereof and of the arguments of the parties having been had, it appearing to the Commission and the Commission now finds:

(a) That the clubhouse of the Detroit Athletic Club is operated by said club solely for the benefit and accommodation of the members of said club and their guests;

(b) That said club does not offer accommodations to the public generally and is not a hotel or substantially similar thereto; and

(c) That said club furnishes living accommodations, namely—one hundred eight rooms with meals to its members and the guests of members, and in such particular is somewhat similar to an apartment hotel, and the parties having agreed subject to the approval of the Commission that said club should be and may be included under the rate classification of Michigan Bell Telephone Company hereinafter mentioned,

Now, therefore, it is hereby *ordered* by the Michigan Public Utilities Commission:

(1st) That complainant, Detroit Athletic Club, is not entitled to a commission on outgoing toll calls;

(2nd) That complainant, Detroit Athletic Club, is proper to be included under the classification or provision of the existing tariff schedules of Michigan Bell Telephone Company which read in part, as follows:

"PRIVATE BRANCH EXCHANGE STATIONS

"In hotel and apartment house buildings in which switchboard is located, each per month 75 cents."

and said club shall be included thereunder as, of and from November 1, 1929, and the rates on the telephone stations subscribed for and used by said Detroit Athletic Club shall be charged for and paid accordingly.

MICHIGAN PUBLIC UTILITIES COMMISSION

Re Tri-County Telephone Company

[T-488.]

Valuation — Reproduction cost generally.

1. While reproduction cost less depreciation is not a controlling element in all cases involving utility valuations for rate-making purposes, it must control unless there are other elements or features of the case which show that the property is worth less than such costs, p. 351.

Valuation — Net additions to plant — Capital account.

2. The value of net additions to the capital account of a telephone utility were computed as of the date when materials were bought for immediate installation, although not actually in service at that date, where a more technical treatment would result in a charge for interest during construction at least equal to any possible return which could be expected on the capital, p. 351.

Valuation — Working capital — Telephone utility.

3. An allowance of 5 per cent of the value of a telephone utility's property was held reasonable for working capital, p. 351.

Valuation — Going value — Necessity for allowance.

4. No consideration was given to an allowance for going value in comput-

ing the rate base of a telephone utility where the rates proposed by the company were reasonable in connection with the valuation without any such allowance being made, p. 351.

Service — Proper procedure for complaints.

5. Complaints against the adequacy of utility service must be made with full notice that the question is up and with full opportunity to both sides to present its evidence, but such a question may not properly be injected into a pure rate controversy, p. 352.

Return — Percentage allowed — Motion for rehearing — Telephones.

6. The Commission refused to grant a motion for the rehearing of a telephone rate controversy terminating favorably to the utility where the rates sought by the company did not afford more than a 7 per cent return on any reasonable or logical computation of value, p. 353.

Service — Complaints against adequacy — Telephones.

7. Complaints against the adequacy of telephone service when made should be fair and intelligent and should be based upon some sort of systematic observation and analysis of the service, and not on glittering generalities, p. 354.

[November 30, 1929.]

APPLICATION *by a city for rehearing of a petition of a telephone company to increase rates which had previously terminated in an order favorable to the utility; motion for rehearing denied.*

CUMMINS, Commissioner: Prior to 1929 the telephone exchange at Adrian had been operated by the Lenawee County Telephone Company for a good many years. The service rendered by the Lenawee County Telephone Company had been very far from satisfactory. Many complaints had been made to this Commission relative to the service rendered by this company, and admittedly, and as shown by previous findings of the Commission, its plant and equipment were sadly out of repair.

February 1, 1929, the exchange was taken over by the Tri-County Telephone Company and later an application was made to this Commission for permission to issue and sell certain securities. As a basis for a securities order the company presented to the Commission an inventory and appraisal of its physical properties. The Commission was unwilling to make an order based upon the company's showing alone, and had its own experts check the entire inventory so that the Commission might be assured of its correctness and had them make their own valuations of such properties.

The result was a somewhat lessened valuation by our representatives than that made by the company itself, but nevertheless sufficient to justify the issuance of an order approving of the securities requested. This valuation was as of May 1, 1929.

August 27, 1929, an application was made to this Commission for an increase of rates, with proof that a notice of the proposed increased rates,

tolls, rentals, and charges had been published in the Adrian Daily *Telegram* according to statute. This notice specified in detail the particular charges proposed to be made for each class of service. This application was brought on to be heard on the 10th day of September, 1929, at which hearing the city of Adrian was represented by its city attorney and by Theodore Joslin, its special counsel.

At this hearing the fullest opportunity was given to all parties to introduce any proof which they might desire to offer either on the question of the proper valuation of the company's properties, or as to the correctness of the company's showing as to its revenues and operating expenses. No request whatever was made for a continuation of the hearing at a later time. At the close of the hearing it was stated by Mr. Joslin that he did not deem it necessary that the Commission should go any further than it had already gone in the matter of the appraisal of the company's physical properties. All parties agreed as to the propriety of the company sending its accountants to the main office of the company to examine its books and report as to the matter of operating expense and revenues before making its decision; and the hearing was closed with the following statement by Commissioner Cummins:

"Is there anything further? If not, the Commission will take this matter under advisement and we will let you know promptly."

This is all a part of the stenographic record of the hearing and can be seen by anyone. The claim that a full opportunity to be heard was not allowed is wholly unfounded.

Thereafter the Commission's accountant did examine the books of the company and reported that as a statement of actual revenues and expenditures, the company's showing was correct. Our accountant was of the opinion that it was probable that some of the expenditures charged to operating expenses would not recur to the same extent in succeeding years, as during the period covered and the probability that this was so was taken into consideration in making the final order. Furthermore, our accountant was of the opinion that 25 per cent of certain operating costs should be deducted from the exchange operating costs and added to the costs charged to the toll division of the business. The effect of this was to diminish the net toll revenues and increase the net exchange revenues substantially.

On December 26, 1929, an order was made allowing the increase of rates as applied for. An application for a rehearing was filed, which came on for hearing on the 30th of October, 1929; and the question now before us is whether or not a rehearing should be had, and if so, what questions should be considered open on such rehearing.

At the time the order was made no written opinion was filed stating the grounds upon which it rested, for the reason that such grounds seemed so obvious that they could not fail to be understood. However, it appears that to the learned representatives of the city the order seemed so clearly wrong that they have not only attacked the order itself but have pub-

licly assailed the motives and integrity of the Commissioners in making it. This makes it imperative that the grounds upon which the decision rests be definitely stated.

No suggestion has been made that if a rehearing were ordered, any proof would be offered on the question of the valuation of the company's property. On that phase of the case it is necessary only to say that the Commission has accepted the report of its own appraisers as to the fair value of the physical properties, used and useful, in the conduct of the Adrian exchange. That value was reported to us as of May 1, 1929 at $276,701.

[1] This valuation is based upon cost of reproduction less depreciation. It is now settled law that reproduction costs less depreciation must always be taken into consideration in determining the fair value of the property of a utility for rate-making purposes. However, we do not understand that this element is in all cases controlling, but it is our opinion that it must control unless there are other elements or features of the case which show that the property is worth less than the costs of reproduction less depreciation. Of course, it may be easily seen that this might be the case. For instance, let us suppose a city of 100,000 people having a telephone plant adequate for the needs of such a city and that by reason of adverse conditions this population was cut in two; manifestly, such a plant would not be worth the cost of reproduction less depreciation, and the loss must fall on the company not on the public, but in this case our attention has not been called to anything of such a character and we are forced to the conclusion that the valuation fixed by our representatives should be accepted as the fair valuation of the company's property.

[2, 3] It is satisfactorily shown that there were net additions to the capital account in the months of May and June of $9,257 in the way of improvements to the properties (other than such as could be charged to operating expense); and that on the day of the rate hearing there were $40,000 worth of new material and equipment on hand for immediate installation. Technically this should not be charged to capital account until actually in service, but in the meantime there should be an interest during construction charge, which would at least equal any possible return which could be expected on capital, and since it is for immediate installation and as soon as installed belongs in fixed capital, as a practical matter it should be included now. Thus, we have a total valuation of the physical assets at $325,958. We are of the opinion that a 5 per cent allowance for working capital is reasonable, which would give us a total valuation, without any allowance for going value, of $342,257.90.

[4] As before stated, this is without allowing anything for going value. Very strong arguments can be advanced for including such an allowance, and the United States Supreme Court has held that it should be taken into consideration. Manifestly, this property (the fair physical value of which is $342,257.90) is worth more in place ready for use in connection with 3,800 customers on the company's books taking service, than the same property would be worth without the customers. In the same location and with the opportunity to get

the business of this number of people it would take time and it would cost money to put the business on the books and there would be lack of revenue while the business was being acquired. But it is a difficult question to know what is a fair allowance for going value, and we do not wish to attempt a precise determination of that matter unless it is necessary to do so. Inasmuch as it seems apparent to us that the rates ordered in this case are, to say the least, reasonable in connection with the valuation above stated without any allowance for going value, we shall leave that item out of consideration. The company itself applied for the proposed rates and the Commission will deem that conclusive, not only now, but in the future, as to the adequacy of those rates unless there should be radical changes in revenues or cost of operation.

The evidence shows that when the present company took over the assets of the former owners a considerable amount of cash was on hand. In 1922, this Commission had directed the company to set up a depreciation reserve equal to 5 per cent per annum on the value of its properties and this cash on hand mainly accrued through failure to use the depreciation reserve for the purposes for which such a reserve is created. It is needless to say that the Commission is not taking this cash on hand into consideration, except as to the allowance for working capital, in determining the valuation of the company's assets, used and useful, in its business, except as the same has already been used since the appraisal, in adding to the capital assets of the company either actually installed or on hand for immediate use.

This brings us to the consideration of the question of revenues and operating expenses. The actual revenues for the first six months of 1929 reduced to an annual basis show a gross annual revenue of $85,736.24. This is somewhat greater than the revenues of the old company due to the fact that the new company has taken on additional subscribers to the number of about 200, who had at least in part previously been denied service. Just what the revenues will be in the future, of course, no one can tell. We are forced to proceed upon the basis of past experience, but it is obvious that increased revenues due to the addition of new subscribers means also increased expenditures.

[5] The operating expense of this exchange for the first six months of 1929 (exclusive of certain nonrecurring items and after a deduction from the company's estimate for taxes) as shown by the Commission's check of the company's books was $34,265.70, making a total annual expense of $68,531.40. This includes no depreciation charges. No specific attack is made upon this expense account other than by comparing it with the expense account of the old company for a similar period in the preceding year. It is true that the present company has expended $34,265.70 in the first six months of 1929, whereas the old company only expended $24,332.58; but, as already stated, it is beyond dispute that the old company was not maintaining its plant in proper repair and its service was poor. Except as to the item of taxes which were estimated and, in our judgment, were estimated at too high a figure, the expenditures of the new company were actually

made, and there is no showing whatever that they were not proper and necessary—nor is there any showing that they are not properly chargeable to operating expense, but we think it very probable that some of the items will not be as large in future periods as they were during this period; but, if we assume that they will be cut down considerably, yet, we must also assume that they will be larger substantially than those of the old company, if the new company maintains its equipment in repair and provides good service, and if it does not, we hope that complaint will be made to us and we shall endeavor to see that such a condition is remedied. Its right to earn a fair rate of return is conditioned on its giving proper service, but it is only fair to say that no offer has been made by the city of Adrian, or by anyone appearing in the case, to make this a hearing on the question of service, although there were casual references to that matter. The Commission is always open for hearings on that question, but when one is had it must be with full notice that that question is up and full opportunity to both sides to present its evidence.

[6] It has been intimated that it is quite possible that this expense account has been made unduly large for the very purpose of providing a showing on which to base rates, but this is an intimation merely. There is no evidence of a single expenditure which was not proper. The new company is employing a large number of operators and is paying the operators better wages than the old one paid; but in the absence of proof, we should feel that any supposition that they are paying operators too much or having too many of them is unwarranted. The company is paying to its operators, according to the evidence, an average of less than $60 per month. We do not think anybody will care to claim that these wages are too high.

Obviously then, on the basis of present revenues and expenditures and on the old rates there would be almost nothing to cover depreciation and return upon investment. If depreciation is to be taken care of and the company is to have any net return, it is perfectly plain that an increase over the old rates must stand, in fact it was expressly admitted by counsel for the city that some increase was necessary.

On the basis of the increased rates allowed in the Commission's order, it is claimed that a gross revenue of in round numbers $100,500 is to be anticipated, which on the basis of the approved expenditures for the first half of 1929 would leave the sum of $33,000 depreciation and return.

What is a proper amount for depreciation is a matter of considerable difficulty. The evidence in this case is, that with the exception of real estate and some other items, 6 per cent is a proper depreciation allowance. No one has disputed this evidence. However, without finding that this is the proper allowance, it is sufficient to say that if the company is to have even a 4 per cent net return on its investment, it will have to be content with a much smaller depreciation charge than 6 per cent. A 5 per cent return will leave approximately 4½ per cent for depreciation. A 6 per cent return will leave approximately

3½ per cent, and 7 per cent (which the courts hold is reasonable) leaves approximately 2½ per cent for depreciation. It is extremely questionable whether the rates we have fixed (if they had been fixed by us without the company's concurrence) would not be deemed confiscatory if the matter were carried into the courts. Any question of that kind is saved by the fact that the company has not asked for more, which is doubtless to be accounted for by the fact that it frequently is true that if an attempt is made to fix rates high enough to produce on paper the rate of return, which the courts hold to be proper, that the result is loss of volume of business and the ultimate defeat of the very purpose for which the rates was supposed to be fixed. Regulatory Commissions and companies themselves find great difficulty in determining where the point is where rates will tend to produce a fair return and not tend to defeat that object. The Commission is of the opinion that the rates as fixed are fair and just from the standpoint of the public, and that, if the company gives the kind of service that it ought to give, the public should be satisfied with the rates.

[7] If it does not give that kind of service the Commission stands ready at all times to do its best to remedy that situation. It is but fair to say, however, that since the exchange has been operated by the new company, expressions of approval of the new company's service have not been uncommon and complaints are comparatively few, and some complaints that have been registered are so manifestly unfair as to require little attention. For instance, one has complained that four times out of five the result of an attempt to use the telephone is getting a wrong number. Of course, this is obviously untrue, as no community would endure such a situation as that. Complaints when made should be made fairly and intelligently and should be based upon some sort of systematic observation and analysis of the service and not on glittering generalities. The application for rehearing must be denied and the rates as established by the order of September 26, 1929 will be confirmed.

ALABAMA PUBLIC SERVICE COMMISSION

Re General Water Works & Electric Corporation

[Docket No. 5745.]

Consolidation, merger, and sale — Objections by municipality — Right to acquisition.

The merger or consolidation of public utility properties should not be dis-

approved because of alleged rights of a municipality to acquire one of the constituent properties, since Commission approval does not prejudice any rights of the municipality in the premises, especially when the Commission order expressly stipulates that it is without prejudice to the rights of the municipality.

[December 3, 1929.]

APPLICATION *of a water works and electric corporation for authority to consolidate several power and light utilities into a single corporation and with authority to issue stock; approved with conditions specified in the opinion herein.*

APPEARANCES: Rushton, Crenshaw & Rushton, Attorneys, for petitioner; Powell & Albritton, Attorneys, and Marcus J. Fletcher, on behalf of the city of Andalusia, intervenor; I. F. McDonnell, Chief Engineer, for the Commission.

By the COMMISSION: In this proceeding, petitioner, the General Water Works & Electric Corporation, seeks authority to merge or consolidate five Alabama utility corporations into one Alabama corporation, to be called the Alabama Utilities Company; and to issue securities.

The record shows that petitioner is a corporation duly organized and existing under the laws of the state of Delaware, having its principal place of business in said state at Nos. 18–20 Dover Lane, Dover, Kent county; that the petitioner owns and operates a number of public utility properties in various parts of the country; that petitioner, or agents acting for and on behalf of petitioner, have purchased or contracted to purchase under certain terms and conditions the outstanding capital stock of the following Alabama corporations doing business as utilities within the state of Alabama:

(1) Andalusia Light & Power Company with capital stock consisting of 168 shares of common stock of par value of $100 each, of a total authorization of 500 shares.

(2) Opp Light & Power Company with capital stock consisting of 200 shares of common stock of par value of $100 each, all authorized and outstanding.

(3) River Falls Power Company with capital stock consisting of 100 shares of common stock of the par value of $100, all authorized and outstanding.

(4) Pea River Power Company, consisting of 1,000 shares of preferred stock of the par value of $100 each, authorized and outstanding, and 2,492 shares of common stock of the par value of $100 each of a total authorized and outstanding of 2,500 shares.

(5) Alabama Utilities Company with capital stock consisting of 500 shares of common stock of the par value of $100 each, all issued and outstanding.

General Description of Property to be Consolidated

ANDALUSIA LIGHT & POWER COMPANY

This company purchases and gen-

erates electric energy for distribution for light and power purposes in the city of Andalusia, Alabama, and surrounding territory, serving a population of approximately 4,000. One thousand forty-eight customers are supplied.

Most of the electrical energy is purchased from the River Falls Power Company. This company owns a steam stand-by plant in Andalusia.

A water system is also owned and operated in this city by the company, serving 709 customers.

Opp Light & Power Company

This company purchases and distributes electrical energy for light and power in Opp, Alabama, serving a population of about 1,600. Four hundred ninety-one customers are supplied.

All the energy is purchased from River Falls Power Company and Pea River Power Company.

River Falls Power Company

This company generates, transmits, and distributes electrical energy for light and power in a number of interconnected towns, some supplied on a wholesale basis and some at retail.

The towns served wholesale are Evergreen, Gantt, and Luverne. The towns served retail are River Falls, Red Level, Dozier, Brantley, and Glenwood. The population served by these retail towns is about 6,500, with a total of 388 customers.

Electrical energy is generated at two hydroelectric stations, located respectively at Point "A" and Gantt on the Conecuh river. Standby connections are made with Pea River Company at Opp and Horseshoe Lumber Company at River Falls.

This company owns and operates a water works at Brantley, supplying 87 customers.

Pea River Power Company

This company generates, transmits, and distributes electrical energy for light and power in a number of interconnected towns, one wholesale and the remainder retail. The wholesale town is Troy, and the retail towns are Elba, Milo, Banks, Brundidge, Clio, Kinston, Ariton, and Samson. The company also serves a few retail power customers at Troy. The population served by the retail towns is about 6,200, with a total of 1,279 customers.

Electrical energy is generated at a hydroelectric plant near Elba on the Pea river. Steam standby stations are maintained at Samson and Troy, and oil engine standby stations at Troy and Brundidge. The company also operates a water works at Samson, serving 249 customers.

Alabama Utilities Company

This company generates by oil engine at Frisco City, transmits and distributes electrical energy to the towns of Frisco City, Repton, and Excell. The population served by this company is about 4,000, with a total of 245 customers. In addition, an 8-ton ice plant is owned and operated in Frisco City.

The original petition, filed in this proceeding, requested authority for the Alabama Utilities Company, which would be formed by merger or consolidation, to issue in payment for the bonds, stocks, notes, and obliga-

tions of the following merging or consolidating corporations: the Andalusia Light & Power Company, Opp Light & Power Company, River Falls Power Company, Pea River Power Company and Alabama Utilities Company, the following securities:

$2,000,000 principal amount of 25-year 5½ per cent first mortgage gold bonds series "A," dated October 1, 1929, secured by a deed of trust to the Central Hanover Bank & Trust Company.

5,000 shares of $7 preferred stock of no par value.

5,000 shares of no par common stock.

Upon hearing the petitioner amended its petition for the issuance of the following securities for the same purpose as above.

$1,600,000 principal amount of 25-year 5½ per cent first mortgage gold bonds, dated October 1, 1929, secured by a deed of trust to the Central Hanover Bank & Trust Company.

7,000 shares of $7 no par preferred stock.

7,000 shares no par common stock.

Under the agreement of merger or consolidation, which the Commission is asked to approve, petitioner proposes to liquidate or discharge by means of the above securities the following stocks, bonds, notes, and obligations by the merging or consolidating companies listed below, including the underlying bonds of the towns of Brantley and Opp.

Andalusia Light & Power Company—168 outstanding shares of 500 authorized shares of common stock of the par value of $100 each.

Opp Light & Power Company—200 total authorized and outstanding shares of common stock of the par value of $100 each.

$15,000 5 per cent mortgage bonds —town of Opp, due September 1, 1936.

$5,000 5 per cent mortgage bonds —town of Opp, due May 1, 1937.

River Falls Power Company—100 total authorized and outstanding shares of common stock of the par value of $100 each.

$1,431,095.85 note of River Falls Power Company to the order of Horseshoe Lumber Company, dated May 11, 1929, payable on demand.

$18,000 5 per cent Mortgage Bonds of town of Brantley due July 1,1942, assumed by company.

Pea River Power Company—2,492 shares of common stock of the par value of $100 each of the total authorized and outstanding amount of 2500 shares, 1000 shares preferred stock of the par value of $100 each.

$250,000 6 per cent mortgage bonds of the Pea River Power Company, dated July 1, 1911, payable in thirty years after date secured by a deed of trust dated September 26, 1911, to the Trust Company of Georgia as trustees.

$250,000 principal amount of 6 per cent mortgage bonds dated July 1, 1927, due twenty years after date secured by a deed of trust dated August 8, 1927, to the Troy Bank & Trust Company.

$24,832 note dated May 11, 1929, to the order of Horseshoe Lumber Company payable on demand.

$151,334.29 6 per cent obligation of Pea River Power Company to Charles Henderson. The amount herein stated being the obligation with interest at 6 per cent to October 1, 1929.

Alabama Utilities Company—500 shares of common stock of the par value of $100 each.

At the hearings held in the Commission's offices in Montgomery, Alabama, on November 4, 1929, the city of Andalusia, by its attorney, petitioned the Commission for the right to intervene.

Intervenor objected to the granting of petitioner's application in so far as Andalusia Light & Power Company is concerned, alleging that the city of Andalusia had by franchise agreement an option to purchase under certain conditions the electric and water utilities owned and operated by the Andalusia Light & Power Company, and the granting of this petition might adversely affect the rights and plans to acquire the plant and property.

Intervenor stated that the city of Andalusia had by action of council decided to exercise their option to acquire this electric and water utility property. The mayor, Mr. Carson, acting on instructions of the city council, had by letter informed the Andalusia Light & Power Company of the action of the council of their decision to exercise the contract right of the city to purchase the property of Andalusia Light & Power Company.

Intervenor filed an exhibit containing copies of certain ordinances of the city of Andalusia alleged to contain the contract right of the city to acquire the electric and water properties, and a copy of a letter written by the mayor to Andalusia Light & Power Company, notifying the company that the city had decided to acquire the property. The intervention was allowed.

No other objection was filed against the granting of the petition.

The Commission, after considering all the evidence, is of the opinion and finds that the merger or consolidation of the five companies into the Alabama Utilities Company is consistent with the public interest, and that the application for issuance of securities in amounts and denominations as amended should be approved, provided said securities will be used to liquidate, in addition to the securities and obligations hereinabove enumerated, the balance due General Water Works & Electric Company at close of business, September 30, 1929.

With these modifications the Commission is of the opinion and finds that the approval of the issue of the securities (a) is for some lawful object within the corporate purposes of the utility; (b) is compatible with the public interest; (c) is necessary or appropriate for or consistent with the proper performance by the utility of its service to the public as such utility and will not impair its ability to perform that service; and (d) is reasonably necessary and appropriate for such purpose.

The Commission is also of the opinion that this action of the Commission in these proceedings cannot prejudice the rights of the city of Andalusia in the matter of its acquiring the property and plant of the Andalusia Light & Power Company. However, we stipulate in our order herein that our action in these proceedings shall be without prejudice to any right of the city of Andalusia in said matters.

An appropriate order in conformity with the above opinion is herewith issued.

Re Illinois Bell Telephone Company

[No. 19401.]

Rates — Telephones — Busy test cabinets.

A specialized form of telephone service in which a device known as a busy test cabinet, designed for the use of commercial subscribers using a number of telephone order takers, was permitted to be installed at a special rate of $1 a month in addition to the rates for the private branch exchange terminals and supplementary outgoing lines.

[November 21, 1929.]

PROPOSED *rates for specialized telephone service; rates approved.*

By the COMMISSION: On July 1, 1929, the Illinois Bell Telephone Company filed with the Commission Sheet No. 22 of Ill. C. C. No. 1, for its Chicago exchange, which provides for the furnishing of busy test cabinets at a monthly rate of $1, in addition to the rates for the private branch exchange terminal and the supplementary outgoing lines. The rate was suspended by the Commission, by order dated July 24, 1929, until November 29, 1929.

The case came on for hearing before the Commission at Chicago on November 12, 1929, at which time the Illinois Bell Telephone Company was represented by counsel. No objectors appeared, and evidence was introduced pertaining to the filing.

The evidence shows that the busy test cabinet is designed for use where a number of telephone order takers are assembled. It permits the order taker, or attendant, by throwing a key, to hold the calling party and, at the same time, get another wire over which he may call other parties for information regarding the call. By throwing another key, the attendant can cause his line to be shown busy at the private branch switchboard, thus preventing the placing of calls at the attendant's position when the attendant is absent, or cannot receive the calls. The throwing of this key, however, lights a small light on top of the cabinet by means of which the supervisor of attendant, or order taker, can see that that particular position is not receiving calls. It also reminds the attendant that his position is shown busy when he is again ready to receive calls.

The evidence further shows that the service proposed to be rendered is a new and special service, which will only be desirable under certain circumstances, and is entirely optional to all subscribers.

The Commission, having received all of the testimony, and having heard the statements of counsel in connec-

tion therewith, and being fully advised in the premises, upon due consideration thereof, is of the opinion and finds:

That the order of the Illinois Commerce Commission entered in this cause, suspending the effective date of the rate provided in Ill. C. C. No. 1, Sheet No. 22, of the Illinois Bell Telephone Company, for its Chicago exchange, should be vacated, set aside, and canceled, and the rate permitted to become effective.

It is therefore *ordered* by the Illinois Commerce Commission, that the order of the Commission entered in the above entitled cause, suspending the rate provided in Ill. C. C. No. 1, Sheet No. 22, of the Illinois Bell Telephone Company, for its Chicago exchange be, and the same is, hereby vacated, set aside, and canceled.

WISCONSIN RAILROAD COMMISSION

Re City of Wauwatosa

[U-3814.]

Discrimination — Gas — Contiguous suburban territory.

1. There is no reasonable justification for requiring the citizens of a metropolitan area to bear any of the costs of service in a contiguous sparsely populated territory where the rates of the latter area compare favorably with any other service in the state for communities of comparable size and character, and where the inhabitants of the certain area pay only a differential upon the difference in the average cost of distribution in the two communities, p. 364.

Discrimination — Location within rate area — Gas.

2. Rates cannot be made for the individual consumer, but must be applied equally to a considerable unit of territory, and the individual customer, whatever his location within the unit, must pay rates to cover the average cost of the unit notwithstanding the fact that his premises might be located just across the street from another customer paying a different gas rate, p. 364.

Discrimination — Rate area — Annexation of territory.

3. The fact that by annexation of a suburban community to a city the lower gas rates of a metropolitan area were applied to the former territory was held not to require a corresponding reduction of gas rates to another suburban community not so annexed, p. 365.

Discrimination — Rate reduction — Intercorporate relation.

4. Where separate corporate entities are involved, even though both are owned or controlled by the same parties, a high rate of earnings of one corporation cannot be used to justify a reduction of the rates of the other, where the other is not earning an excessive return, due to the fact that any reduction of the earnings of the more profitable company must be for the benefit of its own customers who are creating the high earnings, p. 365.

RE WAUWATOSA

Rates — Reasonableness — Reasonable return.

5. Complaints against the rates of a gas company were dismissed when it was shown that the gas company was not earning an excessive return upon any reasonable valuation of the property, and where it was shown that the rates in effect compared favorably with any community in the state of comparable size, p. 365.

[November 9, 1929.]

APPLICATION *by a city for an order reducing rates charged by a gas company; dismissed.*

By the COMMISSION: The application in this case was filed with the Commission on February 5, 1929, and states that the rates now in force fixed by the Railroad Commission of Wisconsin for gas furnished by the Wauwatosa Gas Company in the city of Wauwatosa, are unlawful and unreasonable, and that a readjustment of such rates should be made by the Railroad Commission of Wisconsin substantially reducing the same. The rates complained of are as follows:

General Rate Schedule

First	20,000	cu.	ft.	consumed	per	month	$1.15	per	M	net
Next	80,000	"	"	"	"	"	1.05	"	"	"
"	100,000	"	"	"	"	"	.95	"	"	"
Over	200,000	"	"	"	"	"	.80	"	"	"

Housheating Demand Rate

Demand Charge	$4.00	per	month
Commodity Charge	.75	"	M cu. ft. net

Hearings were held in Wauwatosa on April 22, and May 27, 1929. The city of Wauwatosa was represented by Albert B. Houghton, city attorney, and Ross W. Harris, consulting engineer, the Wauwatosa Civic Association by Lyman Wheeler, and the Wauwatosa Gas Company by Edwin S. Mack.

The argument of the petitioners for the reduction of rates was based mainly upon an exhibit and supporting testimony presented by Ross W. Harris. This exhibit and this testimony were to the effect that the output cost of gas, including a fair return, of the Milwaukee Gas Light Company was less in 1928 than the rates this company charges the Wauwatosa Gas Company and that, if the cost of gas to the Wauwatosa Company were correspondingly reduced, and the full saving passed on to the consumers, the average cost of gas to the Wauwatosa customers would be reduced 5½ per cent.

On Table I of this exhibit Mr. Harris obtains an average value for 1928 of the property of the Milwaukee Gas Light Company of $19,456,-152. This value is obtained by starting with the valuation of the Wisconsin Railroad Commission as of January 1, 1912 and adding to that amount the net additions to property and plant since that time. The second table of this exhibit shows the earnings of the Milwaukee Gas Light Company for the years 1912 to 1928, and the rate of return on the rate base found in Table I for each corresponding year;

this table shows an average rate of return of 11.39 per cent for the years 1922 to 1928, inclusive, and a return of 10.72 per cent for 1928. Table III allocates all charges of the Milwaukee Gas Light Company for the year 1928 as between customer costs and output costs and Table IV is a computation on the basis of this allocation, which shows a consumer cost of $1.065 per month and an output cost of 52.8 cents per thousand cubic feet of gas. Table V shows that the average price paid for gas by the Wauwatosa Company in 1928 was 53.07 cents, and that paid by the West Allis Company was 51.04 cents. Table VI is a cost curve for consumptions of gas ranging from 500 to 5 million cubic feet per month on the basis of the costs as worked out in Tables III and IV; this table shows that, with consumptions as large as those of the Wauwatosa and West Allis companies the total cost is practically identical with the output cost. Table VII shows the consumer costs and output costs of the Milwaukee Gas Light Company computed exactly as in Tables III and IV except, instead of the return actually earned, a return of 7½ per cent of the value found in Table I is used, and the cost is reduced by $122,270.17 nonoperating income. This table shows an output cost to the Milwaukee Gas Light Company of 46.9 cents per thousand cubic feet. Table VIII is a cost curve identical with Table VI, except that it is based on the costs found in Table VII. Table IX is a computation of consumer costs and output costs for 1928 of the Wauwatosa Gas Company, on the basis of an allocation similar to that in Table III; the return actually earned in 1928 and gas at 46.9 cents the cost found in Table VII, are assumed in this table. Table X is a cost curve for consumptions of 500 to 200,000 per month for the Wauwatosa Company for 1928, on the basis of the costs established in Table IX. Table XI compares the cost curve in Table X with a similar curve on the basis of the price actually paid for gas by the company; this table shows a decrease of cost, if gas had been purchased at 46.9 cents, ranging from 2.04 per cent at 500 cubic feet to 7.38 per cent at 200,000 cubic feet and an average decrease of 5.51 per cent. Table XII shows the earnings of the Wauwatosa company for the years 1919 to 1928, inclusive, and the rate of return for each year on the basis of the property and plant account of the company; this table shows a minimum return of 2.02 per cent in 1921 and a maximum return of 9.21 per cent in 1924, a return of 6.35 per cent for 1928 and an average return for the 10 years of 5.67 per cent. Tables XIII, XIV, and XV are a computation of the customer costs and output costs of the Wauwatosa Company under actual conditions in 1928 and Table XVI is a cost curve for various consumptions based on these costs. Page 17 of the exhibit is a summary of the data in these 16 tables.

Mr. Harris' argument for a reduction in rates to Wauwatosa consumers is based on the following points: the output cost to the Milwaukee Gas Light Company of the gas sold in 1928 to the Wauwatosa Gas Company was 46.9 cents per thousand cubic feet, while the Wauwatosa Gas Company paid in 1928 an average price of 53.07 cents per thousand cubic feet;

if the Wauwatosa Gas Company had purchased all its gas in 1928 at an average price of 46.9 cents and earned no more than it did earn, then its average cost of gas delivered to its consumers would have been $1.0843 per thousand cubic feet instead of an actual cost of $1.1264, or a reduction of 5.51 per cent.

In obtaining his average rate base for 1928 of $19,456,152 for the Milwaukee Gas Light Company, Mr. Harris made no allowance for any increase in working capital or in materials and supplies since 1912. Such an allowance would substantially increase the rate base used by Mr. Harris, and consequently increase the output cost of the company. If any consideration of present price levels were to be reflected in the rate base, that base would be increased still more, with a consequent increase of costs. Furthermore, Mr. Harris's cost curve assumes that every customer pays his full customer costs, whereas it is well-known that a very large number of small consumers fall far short of paying this cost, which must consequently be transferred to an output charge to be paid by the larger consumers; such a correction would again increase the output cost of the Milwaukee Gas Light Company.

However, let us assume that the Wauwatosa Gas Company had in 1928 purchased its gas at Mr. Harris' price of 46.9 cents per thousand cubic feet. Table XII of Mr. Harris' exhibit shows the income of the Wauwatosa Gas Company available for return in 1928 to have been $52,518.03; the saving in the purchase price of gas would have been $12,157.29, which would have increased the amount available for return to $64,675.32. In the same table Mr. Harris computes the rate of return of the Wauwatosa Gas Company on the basis of a value for 1928 of $827,499.26. This figure is merely the average of the investment in property and plant as of December 31, 1927, and December 31, 1928, and contains no allowance whatsoever for working capital or for materials and supplies. As of these same dates the company's reports show the following:

December 31, 1927		
Cash	$3,486.07	
Accounts Receivable	35,450.64	
Materials and Supplies	2,214.05	
Prepayments	89.48	
Total		$41,240.24
December 31, 1928		
Cash	$2,976.69	
Accounts Receivable	45,257.08	
Materials and Supplies	2,149.13	
Prepayments	108.11	
Total		$50,491.01
Total both years		$91,731.25
Average for 1928		$45,865.62

These amounts all seem reasonable, and increasing Mr. Harris' rate base by the average amount would produce a figure of $873,364.88. While the Commission does not determine that this is the value of the property of the Wauwatosa Gas Company, it does believe that it is a satisfactory figure for the purposes of this case. Using this value, it appears that the Wauwatosa Gas Company actually earned in 1928 6 per cent upon its investment and that if it had bought its gas at the price of 46.9 cents per thousand cubic feet advocated by Mr. Harris it would have earned 7.4 per eent.

The respondent's reply to the petitioner's exhibit brings out the fact that, while the Wauwatosa Gas Com-

pany paid an average price in 1928 of 53.07 cents per thousand cubic feet for its gas, reductions were put into effect during the year which, had they been in effect all year, would have reduced the average price to 50.28 cents. It is also worth noting that the production costs of the Milwaukee Gas Light Company are increasing; this is mainly due to the fact that a large part of its gas has been purchased under contract at considerably less than generating costs, but the amount that it can so purchase is limited so that as the company's total output increases, the proportion which it must generate increases and its average output cost increases accordingly.

[1] One of the chief complaints of customers that appeared at the hearing was based upon the difference between rates in Wauwatosa and in Milwaukee, especially at the boundary where the difference applies as between houses across the street from one another. While a situation might easily exist, in which it would be advisable for a densely populated political or geographic unit to carry some of the costs of a sparsely populated contiguous unit, because the full costs of the latter unit would require a prohibitive rate for service which it would nevertheless be desirable to supply, there can be no question of such a situation here. The full costs of the service to Wauwatosa consumers, far from being prohibitive, are among the lowest in the state for cities of comparable size and character. There is, therefore, no reasonable justification for requiring the citizens of Milwaukee to bear any of the costs of service in Wauwatosa. Due to the fact that the Wauwatosa Gas Company, instead of producing its own gas, purchases it from the Milwaukee Gas Light Company at a price closely approximating the production costs of that company, the Wauwatosa consumers obtain the benefit of the very low average production cost for Milwaukee, and pay a differential only on the difference in the average cost of distribution in the two communities.

[2] Table V of respondent's exhibit "A" shows that in 1928 the Milwaukee Gas Light Company had only 28.9 feet of main per customer, the West Allis Company 47.8 feet, and the Wauwatosa Company 61.9 feet. The fixed capital of distribution system only per customer in Milwaukee was $96.78 per customer, in West Allis, $134.70 per customer, and in Wauwatosa $191.13. The average cubic feet of gas sold per customer in the same year was 51,889 in Milwaukee, 48,760 in West Allis, and only 41,481 in Wauwatosa. This made the fixed capital (distribution system only) per thousand feet of annual gas sales $1.87 in Milwaukee, $2.76 in West Allis, and $4.61 in Wauwatosa. These conditions would justify a considerable difference in the rates of the three cities. Rates cannot be made for the individual customer, but must be applied equally to a considerable unit of territory and the individual customer, whatever his location within the unit, must pay rates to cover the average cost of the unit. Thus it is logical for premises across the street from one another to pay different gas rates, just as they might be subject to a different tax rate.

[3] The Wauwatosa customers also objected to and considered illogical the fact that customers in North Milwaukee, when their community was annexed to the city of Milwaukee, obtained the lower Milwaukee gas rates, although the cost of serving these customers had in no way changed. As pointed out above, gas rates must be applied to a considerable unit of territory within which costs will actually vary considerably: the rates of the Milwaukee Gas Light Company are applicable to the city of Milwaukee, and when North Milwaukee became a part of the city it was necessary and logical that its residents obtain these rates; the costs of these customers must be averaged with those of the rest of the city to obtain an average cost on which to base rates.

[4] The North Milwaukee property, furthermore, is owned by the Milwaukee Gas Light Company while the Wauwatosa property is owned by a separate corporate entity, the Wauwatosa Gas Company. The ability of the Milwaukee Gas Light Company to reduce the rates in North Milwaukee without reducing its earnings below a reasonable return is, therefore, adequate reason for a rate reduction in North Milwaukee. Where separate corporate entities are involved, even though both are owned or controlled by the same parties, a high rate of earnings of one corporation cannot be used to justify a reduction of the rates of the other, where the other is not earning an excessive return; any reduction of the earnings of the more profitable company must be for the benefit of its own customers who are creating the high earnings.

[5] It appears from the testimony of the petitioners that the strongest objection to the rates at present in force comes from residential customers using considerable quantities of gas. It was brought out by respondent, and there can be no doubt from the evidence, that this class of customer is paying somewhat more than the actual costs of his service to offset the fact that in Wauwatosa, perhaps to an even greater extent than in most communities, the small consumer fails to pay his full costs. This situation is due to the absence of a minimum bill and to a comparatively low initial rate extending through a large block of consumption. However, there was no specific evidence as to how the structure of the rate might equitably be changed and no desire expressed by the petitioners for such a change of the rate structure.

Since the testimony in these hearings shows that the Wauwatosa Gas Company has in the past ten years earned a return considerably below 6 per cent on its investment, that even though the Wauwatosa Gas Company were to purchase its gas from the Milwaukee Gas Light Company at the price of 46.9 cents advocated by the petitioner, which price appears to be somewhat below the actual full costs of the Milwaukee Gas Light Company, the Wauwatosa Company would still not earn an excessive return upon its investment, that distribution costs are considerably higher in Wauwatosa than in Milwaukee, and further that the rates at present in force in Wauwatosa are among the lowest in the state in cities of comparable size, the Commission finds that the rates of the Wauwatosa Gas Company at

present in force are not unreasonable and that no adequate reason has been shown for their reduction.

It is therefore *ordered* that the petition in this matter be and the same is hereby dismissed.

ILLINOIS COMMERCE COMMISSION

John B. Hayes

v.

DeKalb-Ogle Telephone Company

[No. 19202.]

Payment — Telephones — Rules for advance payment.

1. A rule of a telephone company requiring payment in advance for telephone service and providing for the discontinuance of service for failure to pay before the end of the month for which a subscriber might be billed is reasonable, p. 367.

Payment — Telephones — Charge for restoration of service.

2. A telephone company's rule requiring the payment of a restoral charge when service has been discontinued for delinquency in payment by the subscribers was held to be reasonable, p. 368.

Payment — Service charges during disconnection — Telephones.

3. In the absence of any duly filed company rule covering the subject, a telephone utility has no authority to charge a subscriber for service for the period during which his service has been disconnected for nonpayment, p. 368.

[November 26, 1929.]

COMPLAINT *of a telephone subscriber against certain rules and practices of a telephone utility; dismissed in part; sustained in part.*

By the COMMISSION: On May 3, 1929, John B. Hayes, Rochelle, Illinois, filed with the Commission a formal complaint against the DeKalb-Ogle Telephone Company in which protest is made against certain rules of the company which require payment of bills in advance and permit discontinuance of telephone service before the end of the current month when bills are permitted to become delinquent under the terms of said rules and in which objection is also made to payment of reconnection charges when service has been discontinued for failure to pay bills promptly.

The matter came on for hearing at Chicago on July 25, 1929, at which time the complainant herein appeared in his own behalf and Ben B. Boynton appeared on behalf of the respondent.

The record shows that the com-

plainant has been a subscriber of telephone service furnished by the DeKalb-Ogle Telephone Company or its predecessor, the Rock River Telephone Company, in the city of Rochelle for some twenty years last past; that since the month of December, 1926, the complainant has followed the practice of paying his bills on the last day of the current month and the said payments so made were received and accepted by the respondent until the month of December, 1928, at which time the respondent mailed to the complainant a notice of delinquency containing a statement to the effect that if said bill was not paid by December 28, 1928, service would be discontinued and payment not being forthcoming on or before the specified date the service was discontinued until payment was received. Substantially the same procedure was followed by both the complainant and the respondent in January and April, 1929, with the result that the complainant's service was discontinued or suspended in each of the aforesaid months.

[1] The facts in the case regarding the demand for payment and suspension of service are not in dispute but the question is raised as to whether the telephone company is within its rights in requiring payment in advance for service and, in case the subscriber becomes delinquent in the payment therefor, to disconnect or suspend the said service before the end of the month for which he is billed, and also whether or not the company is justified in demanding payment of a reconnection charge and payment for the full month without making any allowance for time during which service was not rendered because of failure to pay bills promptly.

The DeKalb-Ogle Telephone Company has on file with the Commission as a part of rate schedule Ill. C. C. No. 3 rules with provisions pertaining to payment of bills and restoral of service after service is suspended for nonpayment of bills. Item No. 9, Sheet No. 1, applying to all exchanges reads as follows:

"Bills are rendered once a month to cover (a) one month's charges for local exchange service in advance, and (b) toll and other charges in arrears. Bills are payable at the office of the company. If not paid on or before the 15th day after issuance of the bill, written notice calling attention to the fact will be sent to the subscriber after which action service may be discontinued without further notice if settlement of the account is not made by the seventh day. When settlement of the bill is made before telephone instruments have been removed from the premises, service will be restored upon payment of the following restoral of service charge.

(a) If service has been suspended one way only 50 cents.

(b) If service has been suspended both ways $1."

The Commission recognizes the right of a public utility to adopt reasonable rules for the conduct of its business and the rule hereinabove quoted appears to be just and reasonable and similar rules are in fact in effect largely throughout the state of Illinois.

The reasonableness of the regula-

tion relative to payment of bills in advance is sustained by the United States Supreme Court in Southwestern Teleph. & Teleg. Co. v. Danaher (1915) 238 U. S. 482, at p. 489, 59 L. ed. 1419, P.U.R.1915D, 571, 575, 35 Sup. Ct. Rep. 886, L.R.A.1916A, 1028 in the following:

"It was also strongly supported in reason, for not only are telephone rates fixed and regulated in the expectation that they will be paid, but the company's ability properly to serve the public largely depends upon their prompt payment. . . . A regulation requiring payment in advance or a fair deposit to secure payment is reasonable."

Losses due to uncollectible bills are treated as a deduction from gross income in fixing telephone rates. It is, therefore, in the public interest that losses on bad accounts by utilities be held at a minimum. Guarantee against such losses is provided by advance payment for flat rate service.

[2] With respect to restoral charge contained in the company's rate schedule on file with the Commission and now in effect such a charge is justified by the fact that the company is put to an additional expense in connection with the discontinuance and restoration of the service and that such additional expense should be borne by the subscriber responsible for the same. A charge of the same character and amount is in effect quite generally throughout the state and is in harmony with the intent of this Commission's General Order 109.

[3] The complainant contends that he should not be required to pay for service during the time the said service was suspended, which the record shows was from one to three days during each of the three months, December, January, and April, respectively.

This is a matter not covered by the rules and regulations of the company and in the absence of such a rule requiring payment for service during the period of suspension and without at this time passing upon the reasonableness of such a rule, the Commission is of the opinion that the subscriber should not be charged for the time service was interrupted.

The Commission having carefully considered all of the evidence of record is of the opinion and finds:

1. That the company is within its rights in requiring payment in advance for telephone service and discontinuing service to the complainant for failure to comply with the rules of the company regarding this matter and that the regular reconnection charge provided by the company's rules should be made and collected from the complainant in each instance which resulted in the discontinuance of service for failure to pay bills promptly.

2. That the company has no rule or regulation which would permit it to charge and collect for service during the time same was suspended for nonpayment of bills and that the company should not require payment from the subscriber for the periods service was suspended.

It is therefore *ordered* by the Illinois Commerce Commission as follows:

Section 1. That the complaint in so far as it refers to the policy of the company regarding collecting in ad-

vance, the discontinuance of service, and the charge for re-establishing of service in case of failure to comply with the collection rules of the company, be, and the same is hereby dismissed.

Section 2. That the DeKalb-Ogle Telephone Company, be, and the same is hereby ordered to make proper reparation to the complainant for money collected by the said DeKalb-Ogle Telephone Company for periods during which the complainant's service was suspended.

NORTH CAROLINA SUPREME COURT

O. W. Holmes

v.

City of Fayetteville

[No. 285.]

[197 N. C. —, 150 S. E. 624.]

Municipalities — Character of act — Dual capacity.

1. A city or town, in its governmental capacity, acts as an agency of the state for the better government of those who reside within the corporate limits, but in its private or quasi-private capacity it exercises powers and privileges for its own benefit, p. 373.

Municipal plants — Powers of municipality — Area of operation.

2. Notwithstanding the general rule that a municipal corporation has no extraterritorial powers, the legislature has undoubted authority to confer upon cities and towns jurisdiction for sanitary and police purposes in territory contiguous to the corporation, p. 373.

Constitutional law — Delegation of powers — Municipal plant operations.

3. Delegation by the legislature to a municipality of authority to maintain a utility service beyond its corporate limits was held not to contravene a constitutional requirement that the legislature provide by general laws for the organization of the municipality, in view of the fact that there is no contract between the state and the public that a municipal charter shall at all times be subject to the direction and control by which it is granted, p. 374.

Municipalities — Power to contract — Judicial interference.

4. The exercise of powers for the private advantage of a city is subject to the same rules that govern individuals and private corporations, and the courts will not interfere with the power to contract, especially when expressly conferred, unless it contravenes some fundamental principle or conflicts in some way with organic law, p. 374.

Constitutional law — Special legislation — Extension of municipal rights.

5. The action of the legislature in permitting a municipal plant to extend its service beyond its corporate limits was held not to offend a constitutional prohibition against the creation of a corporation or the amendment of its charter by special act rather than by general laws, where such constitutional clause has been held to apply only to private or business corporations and not to those of a public or quasi-public nature, p. 375.

Municipal plants — What constitutes public purpose.

6. A municipality furnishing a utility service renders service for a public purpose, and the fact that service might be supplied for individual consumption or the use of the inhabitants or other incidental private purposes does not destroy the public character of the corporation or of the municipality, p. 375.

Constitutional law — Deprivation of property — Municipal plant operation — Outside city limits.

7. A municipal plant by bearing the cost of extensions of service beyond its corporate limits does not violate the Fourteenth Amendment of the Federal Constitution to the extent of depriving city taxpayers of their property rights, where such activities are financed entirely out of the profits of the business without any use of tax funds, p. 376.

[November 20, 1929.]

SUIT *by a taxpayer to restrain a city from paying out any of its funds for the erection and maintenance of an electric transmission line beyond its corporate limits; action of lower court dissolving a temporary restraining order affirmed.*

This was a motion to continue to the hearing an order restraining the defendant from paying out any of its funds for the purpose of erecting and maintaining an electric transmission line beyond its corporate limits and furnishing an electric current to persons, firms, and corporations outside the corporate limits, heard by Cranmer, J., at chambers, on March 26, 1929. The temporary restraining order was dissolved and the plaintiff excepted and appealed upon error assigned.

In 1905, the general assembly amended the charter of the defendant by creating a "Public Works Commission," to consist of three members, who should have charge, control, supervision, and management of all the defendant's public utilities, including waterworks, sewerage, electric light plant, etc., and who should have power and authority to make necessary contracts for the construction, repair, alteration, enlargement, and proper management of any of said public utilities, and to fix rates for their use. Private Laws 1905, Chap. 311. In 1925, this act and other acts were amended and the corporate powers of the defendant were enlarged. Private Laws 1925, Chap. 28. By these amendments the defendant was authorized and empowered to purchase, conduct, own, lease, and acquire utilities and to provide for all things in the nature of public works, and to acquire, establish, and operate waterworks, electric lighting systems,

etc. Section 3 of article 2 says that all ordinances enacted in the exercise of the police power for sanitary purposes or the protection of the defendant's property shall, unless otherwise provided by the aldermen, apply with equal force to the territory outside the city limits within one mile in all directions from the corporate boundaries. Article 3 provides for acquiring by purchase or condemnation rights of way, easements, and privileges for water, sewer, and electric light systems either within or outside the city, and § 7 of article 7 for the supervision of electric light, water, and sewerage plants. On March 16, 1929, § 3, art. 2, of the Act of 1925, *supra,* was amended by adding thereto the following: "Section 4—That said city of Fayetteville be and it is hereby authorized and empowered in its discretion, to extend, construct, maintain, and operate its water, sewerage, and electric light lines and systems for a distance of not exceeding 3 miles in all directions beyond the corporate limits of said city as the same now exist or may hereafter be established; and to make reasonable charges for the use of such utilities." All laws in conflict with the act were repealed. Private Laws 1929, Chap. 190.

"The city may own and maintain its own light and waterworks system to furnish water for fire and other purposes, and light to the city and its citizens," etc. C. S. § 2807. This statute was amended in 1929 by inserting after the word "citizen" the following: "And to any person, firm, or corporation desiring the same outside the corporate limits, where the service is available." Public Laws 1929, Chap. 285, § 1. This act (§ 2) amends C. S. § 2808, by adding the following: "Provided, however, that for service supplied outside the corporate limits of the city, the governing body, board, or body having such waterworks or lighting system in charge, may fix a different rate from that charged within the corporate limits, with the same exemption from liability by the city or town as is contained in § 2807."

Appearances: Brooks, Parker, Smith & Wharton, of Greensboro, and C. Murchison Walker, of Fayetteville, for appellant; Robinson, Downing & Downing and Nimocks & Nimocks, all of Fayetteville, for appellee.

ADAMS, J.: The defendant has no plant of its own for producing and furnishing electricity as a public utility, but it owns and maintains a system of poles, wires, and appliances for transmitting and delivering electricity to persons, firms, and corporations within the city. Some years ago it made a contract with the Carolina Power & Light Company, which is now in effect, for the purchase of an electric current for the use of the city and for resale or redistribution within the corporate limits and within adjacent territory, distant not more than 3 miles from the corporate boundaries. The contract is to continue ten years from September 10, 1924. The company is to supply all the electric power requirements of the city not to exceed certain electrical horse power. The city shall not sell or permit others to use power supplied under the contract except when expressly provided for in the rate classification under which the service is furnished, and the company

shall have the right to serve only such power customers within the area as shall require an installation aggregating not less than 25 horse power.

After the creation of the Public Works Commission, the city extended its light and water systems beyond the corporate limits, thereby supplying a normal school, a women's home, and various individuals outside the city with light and water, and at the commencement of this action was engaged in constructing lines for selling electricity to persons and corporations outside the city limits, but within the 3-mile zone. It intends, unless restrained, to complete this work. For more than ten years it has owned and operated transmission lines beyond the corporate boundaries, by which, it is alleged, electricity has been sold and is now sold to nonresidents at a profit.

Some time ago the plaintiff put up poles and lines outside and within less than 3 miles of the city boundaries, and the city furnished meters and electricity to persons using these lines under an agreement with the plaintiff; and it is now the purpose of the city to abide by its agreement if the plaintiff's lines are maintained in such way as to enable the defendant to provide reasonable service to its customers.

The plaintiff recently conveyed his transmission lines to the Holmes Electric Company, Incorporated, and this company, soon after the conveyance, applied to the Carolina Power & Light Company for the purchase of an electric current for resale or distribution to persons and corporations within and beyond the 3-mile limit. The plaintiff's application was rejected by the power and light company, and its subsequent effort to secure from the superior court a writ of mandamus to compel an acceptance of its application was denied. Holmes Electric Co. v. Carolina Power & Light Co. (1929) 197 N. C. —, 150 S. E. 621.

The relief sought by the plaintiff in this action is a perpetual injunction to restrain the defendant from using its funds to erect and maintain a line for transmitting an electric current to persons, firms, or corporations outside the boundaries of the city. In dissolving the restraining order, the judge determined the action upon its merits and rendered a final judgment. Lutterloh v. Fayetteville (1908) 149 N. C. 65, 62 S. E. 758. This judgment the plaintiff assails on the ground that the defendant has no legal right to engage in a private enterprise beyond its corporate limits and because the act of 1929, purporting to grant the power, was enacted in violation of the state and Federal Constitutions.

The plaintiff specifically rests his right to relief on two propositions, the first of which is this: A municipality which is not engaged in the manufacture of electricity, but is supplied an electric current from an electric power company, cannot engage in the business of selling such electric current to inhabitants outside of the boundaries, where its activities outside of its corporate limits in no way contribute to a fulfilment of its municipal functions or duties to the citizens within its boundaries.

The powers of a municipal corporation are those granted in express words, those necessarily or fairly implied in, or incident to, the powers expressly granted, and those essential to the declared objects and purposes

of the corporation. 1 Dillon (5th Ed.) § 237. The sources of its powers are its charter, special acts, general statutes, and the organic law. 1 McQuillin (2d Ed.) 363.

[1] The dual capacity or twofold character possessed by municipal corporations is governmental, public, or political, and proprietary, private, or quasi private. In its governmental capacity a city or town acts as an agency of the state for the better government of those who reside within the corporate limits, and in its private or quasi private capacity it exercises powers and privileges for its own benefit. Scales v. Winston-Salem (1925) 189 N. C. 469, 127 S. E. 543. "In its proprietary or private character the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual; and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded *quoad hoc* as a private corporation, or at least not public in the sense that the power of the legislature over it or the rights represented by it are omnipotent." 1 Dillon (5th Ed.) § 109, quoted in Asbury v. Albemarle (1913) 162 N. C. 247, 253, 78 S. E. 146, 149, 44 L.R.A.(N.S.) 1189.

[2] The general rule is that a municipal corporation has no extraterritorial powers; but the rule is not without exceptions. The legislature has undoubted authority to confer upon cities and towns jurisdiction for sanitary and police purposes in territory contiguous to the corporation. State v. Rice (1912) 158 N. C. 635, 74 S. E. 582, 39 L.R.A.(N.S.) 266; Chicago P. & P. Co. v. Chicago (1878) 88 Ill. 221, 30 Am. Rep. 545. If a municipality owns and operates a water or lighting plant and has an excess of water or electricity beyond the requirements of the public, which is available for disposal, it may make a sale of such excess to outside consumers as an incident to the proper exercise of its legitimate powers. 3 Dillon (5th Ed.) § 1300; Dyer v. Newport (1906) 123 Ky. 203, 94 S W. 25; Muir v. Murray City (1919) 55 Utah, 368, 186 Pac. 433; Sibley v. Ocheyedan Electric Co. (1922) 194 Iowa, 950, 187 N. W. 560. The excess may be sold, although the city, instead of owning the plant, gets its supply by contract. Riverside & A. R. Co. v. Riverside (C. C. 1902) 118 Fed. 836.

In the case before us, the record does not disclose the exercise of the police power or the sale of a surplus current. The direct question is whether the defendant is authorized to sell electricity to persons and corporations outside its limits when the electric current is furnished by the power and light company in pursuance of the contract between these parties.

We think there can be no question as to the defendant's right to purchase electricity for its own use and for the use of its inhabitants. Private Laws 1925, chap. 28, art. 2, § 1; Pond on Public Utilities, § 54. It is equally clear that without legislative authority the defendant would not be permitted to extend its lines beyond the corporate limits for the purpose of selling

electricity to nonresidents of the city. Paris v. Sturgeon (1908) 50 Tex. Civ. App. 519, 110 S. W. 459; Sweetwater v. Hamner (1923) (Tex. Civ. App.) 259 S. W. 191; Dunlap v. Gainesville (1917) 147 Ga. 344, 94 S. E. 247; Mulville v. San Diego (1920) 183 Cal. 734, 192 Pac. 702.

[3] This situation presents the two questions whether such legislative authority has been granted, and, if it has, whether the grant is effective in law. The answer to the first is not in doubt. The recent amendment to the defendant's charter provides: "Sec. 4. That said city of Fayetteville be and it is hereby authorized and empowered, in its discretion, to extend, construct, maintain, and operate its water, sewerage, and electric light lines and systems for a distance of not exceeding 3 miles in all directions beyond the corporate limits of said city as the same now exists or may hereafter be established; and to make reasonable charges for the use of such utilities." Private Laws 1929, chap. 190. At the same session of the General Assembly, C. S. § 2807 was amended by authorizing a city to furnish water and lights, not only to its citizens, but "to any person, firm, or corporation desiring the same outside the corporate limits, where the service is available." Public Laws 1929, chap. 285, § 1. Section 2 of this chapter adds to C. S. § 2808 the following: "Provided, however, that for service supplied outside the corporate limits of the city, the governing body, board, or body having such waterworks or lighting system in charge, may fix a different rate from that charged within the corporate limits with the same exemption from liability by the city or town as is contained in § 2807."

Now as to the second question: The Constitution requires the legislature to provide by general laws for the organization of cities, towns, and incorporated villages. Article 8, § 4. In Perry v. Franklin County (1908) 148 N. C. 521, 62 S. E. 608, it is suggested that by inadvertence this section was given an improper placing in article 8 instead of article 7; but, without regard to its place in the Constitution, the section contains, not only a grant of power to the legislature, but the imposition of a duty to provide by general laws for the organization of municipal corporations. It has often been said that such corporations are mere instrumentalities of the state for the more convenient administration of local government. They are creatures of the legislature, public in their nature, subject to its control, and have only such powers as it may confer. These powers may be changed, modified, diminished, or enlarged, and, subject to constitutional limitations, conferred at the legislative will. There is no contract between the state and the public that a municipal charter shall not at all times be subject to the direction and control of the body by which it is granted. Wood v. Oxford (1887) 97 N. C. 227, 2 S. E. 653; Lilly v. Taylor (1883) 88 N. C. 489; Wharton v. Greensboro (1907) 146 N. C. 356, 59 S. E. 1043; Lutterloh v. Fayetteville (1908) 149 N. C. 65, 62 S. E. 758; Cabe v. Board of Aldermen (1923) 185 N. C. 158, 116 S. E. 419; Martin v. Greensboro (1927) 193 N. C. 573, 137 S. E. 666.

[4] The Constitution prohibits a city from contracting any debt,

pledging its faith, loaning its credit, or levying any tax, except for necessary expenses, unless by the vote of a majority of the qualified voters. Article 7, § 7. The voters have not given their approval to the proposed enterprise; but the city does not purpose to disregard either of these constitutional inhibitions. It intends to use only such available funds as it has, and such as it will receive as the profits of the business. This course was pursued in the erection of a building in the city of Durham, and was approved by this court; but the auditorium was in the city and was intended for a public purpose. Adams v. Durham (1925) 189 N. C. 232, 126 S. E. 611. In Briggs v. Raleigh (1928) 195 N. C. 223, 141 S. E. 597, it was held that a state fair is a public undertaking and that a donation out of the funds of the city, approved by a majority of the qualified voters, could lawfully be made for retaining the fair outside the corporate limits, but within the vicinity of the city.

Neither of these cases is decisive of the present appeal. The defendant contends that, as the Constitution confers upon the general assembly power to provide by general laws for the organization of cities, towns, and villages, the legislative branch of the government may grant municipal corporations any powers which promote the welfare of the public and the communities in which they are established, unless prohibited by the organic law. The controlling principle is that the exercise of powers for the private advantage of a city is subject to the same rules that govern individuals and private corporations, and that the courts will not interfere with the power to contract, especially when expressly conferred, unless it contravenes some fundamental principle or conflicts in some way with the organic law. 43 C. J. 235, § 233; Henderson v. Young (1904) 119 Ky. 224, 83 S. W. 583; Coldwater v. Tucker (1877) 36 Mich. 474, 24 Am. Rep. 601; Pittsburgh v. Brace Bros. (1893) 158 Pa. 174, 27 Atl. 854. The contract between the defendant and the power and light company is limited in point of duration; and under its terms light can be furnished only by the defendant to those within the 3-mile zone.

[**5, 6**] The appellant's second proposition is this: The legislature of North Carolina cannot, by special act, constitutionally confer upon the city of Fayetteville the power to extend its electric power lines beyond its corporate limits and to furnish electricity to inhabitants beyond the territory embraced in these boundaries.

It is contended that the act amending the charter of the defendant is in violation of article 8, § 1, of the Constitution: "No corporation shall be created nor shall its charter be extended, altered, or amended by special act, except corporations for charitable, educational, penal, or reformatory purposes that are to be and remain under the patronage and control of the state; but the general assembly shall provide by general laws for the chartering and organization of all corporations and for amending, extending, and forfeiture of all charters, except those above permitted by special act. All such general laws and special acts may be altered from time to time or repealed; and the general assembly may at any time by special

act repeal the charter of any corporation."

It has been held that this section applies only to private or business corporations and not to those of a public or quasi public nature, such as cities, towns, and counties. Kornegay v. Goldsboro (1920) 180 N. C. 441, 105 S. E. 187. A municipality furnishing water or light renders service for a public purpose, and the fact that the water or service is furnished for individual consumption or the use of the inhabitants does not detract from the public service. Private purposes may be served incidentally, but this does not destroy the public character of the corporation or municipality. 3 Dillon (5th Ed.) § 1300. Even if the amendment be construed as a private act, the appellant's objection would not be fatal to the defendant's position, for the reason that the legislature has enacted general statutes, applicable to all cities and towns, which in effect confer the same powers given by the amendment to the charter.

[7] In our opinion neither the amendment to the charter of the city nor the statutes amending the general laws to which we have referred are in conflict with the Fourteenth Amendment of the Federal Constitution, upon the facts appearing in the record, in that, by means of levying a tax, the taxpayer's money and property will be taken from him and applied to purposes outside the city limits. The theory on which the defendant's action is based is not that of taxing the inhabitants of the city for extraterritorial purposes, but the maintenance of its lines beyond the corporate limits out of the profits arising from the business within the 3-mile limit. If the defendant should attempt to pledge the faith of the city or to contract a debt or to levy a tax for an enterprise conducted within the designated territory, the taxpayer would have ample remedy; but, so long as the defendant's action is not in breach of any constitutional provision, we do not perceive why it may not be justified by legislative sanction. The judgment is affirmed.

Affirmed.

UNITED STATES SUPREME COURT

Interstate Commerce Commission

v.

United States of America ex rel. City of Los Angeles

[No. 54.]

[280 U. S. 52, 74 L. ed. —, — Sup. Ct. Rep. —.]

Service — Power of the Interstate Commerce Commission — Terminal construction.

The Interstate Commerce Commission has no statutory authority by vir-

tue of the Interstate Commerce Act, or amendments adopted pursuant thereunto, to require rail carriers subject to the act to build a union passenger station, in view of the failure of Congress to delegate expressly and specifically such an important power.

[November 25, 1929.]

CERTIORARI to the court of appeals of the District of Columbia to review a judgment reversing the action of the Supreme Court of the District of Columbia dismissing a petition by the city of Los Angeles for a writ of mandamus to compel the Interstate Commerce Commission to consider an order requiring railroad companies to build a union passenger terminal in certain cities; judgment of the Court of Appeals reversed.

See same case below, — App. D. C. —, 34 F. (2d) 228.

APPEARANCES: Daniel W. Knowlton, for petitioner; Jess E. Stephens, of Los Angeles, California, and Mr. Max Thelen, of San Francisco, California, for respondent.

Mr. Chief Justice TAFT delivered the opinion of the court:

By petition filed July 12, 1928, respondent sought from the supreme court of the District of Columbia a writ of mandamus compelling petitioner, the Interstate Commerce Commission, to consider the evidence introduced in the proceeding before it known as Los Angeles Passenger Terminal Cases (1925) 100 Inters. Com. Rep. 421, 142 Inters. Com. Rep. 489, for the purpose of determining whether the Commission shall order the Atchison, Topeka & Santa Fe Railway Company, the Southern Pacific Company, and the Los Angeles & Salt Lake Railroad Company to build and use an interstate union passenger station in the city of Los Angeles, California; and after consideration of the evidence, to make such order therein as the facts may require. The supreme court of the District dismissed the petition. The court of appeals reversed its judgment and remanded the cause for further proceedings. (1929) — App. D. C. —, 34 F. (2d) 228. This court granted a writ of certiorari (1929) 279 U. S. 830, 73 L. ed. 980, 49 Sup. Ct. Rep. 349.

The Railroad Commission of that state had, in 1921 (19 Opinion of the R. R. Com. of Cal. pp. 740, 937), ordered the carriers to file plans, etc., and to acquire sufficient land within what is known as the "Plaza area" in that city for a union passenger station and terminal, to submit plans therefor, and, upon their approval of them by that Commission, to proceed with the construction of the station. The carriers carried these orders by writs of certiorari to the supreme court of the state, and that court, in Atchison, T. & S. F. R. Co. v. Railroad Commission (1922) 190 Cal. 214, 211 Pac. 460, held that by the Transportation Act of [February 28], 1920 [41 Stat. at L. 456, chap. 91, U. S. C. title 49] Congress had taken exclusive authority over the matter of a union interstate terminal depot, and

the court, therefore, denied the State Railroad Commission the jurisdiction which it had sought to exercise. The State Railroad Commission petitioned this court for writs of certiorari and at the same time instituted proceedings before the Interstate Commerce Commission which resulted in the orders above referred to.

This court granted a writ of certiorari and on April 7, 1924, rendered its decision in Railroad Commission v. Southern P. Co. (1924) 264 U. S. 331, 68 L. ed. 713, P.U.R. 1924D, 246, 44 Sup. Ct. Rep. 376, wherein, in affirming the judgment of the state court, we held that the relocation of tracks, which were incidental to the proposed union passenger station, required a certificate of approval by the Interstate Commerce Commission under ¶¶ 18 to 21 of § 1, Interstate Commerce Act, as amended by § 402, Transportation Act of 1920 (41 Stat. at L. 476, 478, chap. 91, U. S. C. title 49, § 1), as a condition precedent to the validity of any action by the carriers or of any order by the State Railroad Commission, and that until the Interstate Commerce Commission had acted under those paragraphs, the carriers could not be required to provide a new union station or to extend their main tracks thereto as ordered by the State Railroad Commission.

Pending the hearing of the causes in 264 U. S. 331, *supra,* the direct proceeding, referred to above, was instituted before the Interstate Commerce Commission by the city of Los Angeles, asking for an order by the Commission requiring the three railroads to build a new union station at the Plaza site. With it were consolidated an application by the Southern Pacific Company for authority to abandon certain main line tracks and the operation of passenger and freight train service on Alameda street, and an application by the Southern Pacific and the Salt Lake for authority to construct new, and to extend existing, lines.

The Commission held (100 Inters. Com. Rep. 421) that it was without authority to require the construction of the new union station. It said in the report, at page 430:

"We conclude that we are not empowered to require the construction of a union passenger station as sought in No. 14,778. To make the record clear, we repeat that no question of discrimination or preference is presented here and that under the issue framed in the complaint in No. 14778 we will give no consideration to matters shown of record for the purpose of determining whether we should issue an order requiring the construction and use of a union station by any of the defendants."

The Commission, in order to facilitate despatch in the disposition of the case, although it held that it had no power to require the building of an interstate commerce passenger station, made hypothetical certificates, which could be summarized as follows:

(1) That the public convenience and necessity require the extensions of lines that may be necessary to reach and serve any union passenger station within the Plaza which may be constructed in accordance with a lawful order of the State Commission and that may be necessary to

provide for the incidental rearrangement of passenger and freight routes, and that the expense involved will not impair the carriers' ability to perform their duties to the public. (2) That public convenience and necessity permit the abandonment of train service on Alameda street and such other abandonments of lines as would be necessary in connection with the establishment of any such station, so lawfully ordered by the State Commission. The report further found that such joint use of track or other terminal facilities as may be incidental and necessary to the proper operation of any such union station is in the public interest and is practicable, without substantially impairing the owning carriers' ability to handle their own business. As to the application by the Southern Pacific and Salt Lake to extend their lines to permit the joint use of the Southern Pacific's existing station, the Commission's findings were unfavorable and its order denied the application. The Commission's then report was not accompanied by certificates carrying out its findings, and it reserved jurisdiction to alter its findings in the event that the plan of the State Commission, as finally evolved, should be materially different from that "as here considered to be in the public interest."

After a further hearing in the direct proceeding instituted by Los Angeles for an order directing the erection of a union station, the prayer of Los Angeles was denied. (142 Inters. Com. Rep. 489.) Thereafter the city filed the petition above referred to in the supreme court of the District of Columbia for a writ of mandamus. This was in the present proceeding.

Attached to the petition as exhibits were the pertinent parts of the record in the previous cases. There were filed an answer of the Commission, and a demurrer to the answer. The Commission still adhered to its original report. The supreme court of the District entered a judgment overruling the demurrer and, the city electing to stand upon the petition, dismissed the petition. On an appeal, the judgment was reversed by the court of appeals of the District, which held, in substance, that the Commission was vested with supervisory control over the three carriers and that they were subject to an order requiring the construction of the union station and the necessary connecting tracks prayed for.

The sole question for decision is whether the Interstate Commerce Commission has jurisdiction to order the construction of the union station. This issue arises on provisions of the Interstate Commerce Act [February 4, 1887] 24 Stat. at L. 379, chap. 104, as amended by the Transportation Act of 1920, 41 Stat. at L. 456, chap. 91, U. S. C. title 49. These are ¶¶ 18 to 22 added to § 1 of the original act, and ¶¶ 3 and 4 of § 3.

These paragraphs and sections of the Transportation Act of 1920 may be shortly stated as follows:

Paragraph 18 forbids the construction of a new line of railroad, or the acquisition or operation of any line of railroad or extension thereof in interstate commerce, unless there shall have been obtained from the Commission a certificate that the present and future convenience and necessity re-

quire or will require the construction or operation of additional or extended line of railroad, and forbids any interstate carrier to abandon all or any portion of its line, unless there shall have been obtained from the Interstate Commerce Commission a certificate of public convenience and necessity.

Paragraph 19 requires notice and hearings in any proceeding to secure such certificate.

Section 20 gives the Commission discretionary power to issue such certificates and provides for an injunction at the suit of the United States for any construction, operation, or abandonment of such line of railroad or extension thereof without a certificate, and punishes a violation.

Section 21 provides that after a hearing in such proceeding upon complaint, or upon its own initiative without complaint, the Commission may authorize or require by order any carrier by railroad subject to the act to provide itself with safe and adequate facilities for performing as a common carrier its car service, as that term is used in the act, and to extend its line or lines, if the Commission finds that it is reasonably required in the interest of public convenience and necessity, and will not impair the ability of the carrier to perform its duty to the public.

Section 3, embracing ¶¶ 3 and 4, provides, in ¶ 3, that carriers shall afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith and forbids discrimination.

Paragraph 4 provides that if the Commission finds that to do so will not substantially impair the ability of a carrier owning and entitled to the enjoyment of terminal facilities to handle its own business, it may require the use of any such terminal facilities of any carrier, including main-line track or tracks for a reasonable distance outside of such terminal, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may deem just and reasonable for the use so required, as if in condemnation proceedings.

In its final report the Interstate Commerce Commission held that it had no power to require the construction and operation of a union station upon the site specified. The Commission's report was in part as follows:

"Complainants have again raised the question whether we have power to require the defendants to construct and operate a union passenger station upon the site heretofore specified in our findings. Their contention that we have such power was pressed with vigor upon the original submission before us. The complainants point to § 3, ¶¶ 3 and 4 of the Interstate Commerce Act as furnishing the necessary statutory authority. As stated in the original report [100 Inters. Com. Rep.] at page 430, we concluded that we are not empowered to require the construction of a union passenger station as sought in No. 14778, under the issues framed in the complaint therein.

. . . In Alabama & V. R. Co. v. Jackson & E. R. Co. (1926) 271 U. S. 244, 250, 70 L. ed. 928, 931, 46 Sup. Ct. Rep. 535, the Supreme Court said:

"'In matters relating to the construction, equipment, adaptation, and use of interstate railroad lines, with the exceptions specifically set forth in ¶ 22, Congress has vested in the Commission the authority to find the facts and thereon to exercise the necessary judgment. The Commission's power under ¶ 3 of § 3 to require the establishment of connections between the main lines of carriers was asserted by it in Pittsburgh & W. V. R. Co. v. Lake Erie, A. & W. R. Co. (1923) 81 Inters. Com. Rep. 333, a case decided after the withdrawal by the Jackson & Eastern of its application to the Commission for leave to make the junction at Curran's Crossing, and in Chamber of Commerce v. Wichita Falls, R. & Ft. W. R. Co. (1926) 109 Inters. Com. Rep. 81. That its jurisdiction is exclusive was held in People ex rel. New York C. R. Co. v. Public Service Commission (1922) 233 N. Y. 113, 119–121, P.U.R.1922E, 229, 135 N. E. 195, 22 A.L.R. 1073. Compare Lake Erie, A. & W. R. Co. v. Public Utilities Commission (1923) 109 Ohio St. 103, 141 N. E. 847.'"

The Commission proceeded:

"The distinction between a simple switch connection such as was contemplated by the cases previously referred to, and the elaborate facilities sought to be required by us in the present case, is obvious. Re-examination of the whole subject again leads us to the conclusion that under existing law we are not empowered to require the construction of a union passenger station of the character sought by the complaint. . . .

"All issues of fact having been considered and concluded by our original report and this report on further hearing, nothing remains for us but to deny the application of the city of Los Angeles and the intervener, the Railroad Commission of the state of California, for a final order herein requiring the construction of a station as found in the public interest."

In weighing the effect of the transportation act, it should be noted that in this important measure affecting associations between interstate carriers of a compulsory character, there is nowhere express authority for the establishment of union passenger stations, compulsory or otherwise. Emphasis is put on a physical connection between the tracks of one carrier and others if permitted by the Interstate Commerce Commission and if properly paid for, either by agreement or condemnation, by the carrier enjoying the use of the tracks of the other companies. But it is limited in extent to connections with the terminals of other companies within a reasonable length. This court said:

The possible peril to interstate commerce in a physical connection between two main tracks "shows that the jurisdiction of the Commission over such connections must be exclusive if the duty imposed upon it to develop and control an adequate system of interstate rail transportation is to effectively performed. Moreover, the establishment of junctions between the main lines of independent carriers is commonly con-

nected with the establishment of through routes and the interchange of car services and is often but a step toward the joint use of tracks." Alabama & V. R. Co. v. Jackson & E. R. Co. *supra,* at p. 250 of 271 U. S.

The description in the Alabama & V. R. Co. Case, *supra,* is that of a physical connection between railroads engaged in interstate commerce, but it contains no suggestion that the junction is to include union passenger stations.

There are cases in the state courts in which by virtue of statutory provision railroads are required expressly to unite in a passenger station, if determined by commissioners appointed by the court or by a Railroad Commission (Worcester v. Norwich & W. R. Co. (1871) 109 Mass. 103, 113; Railroad Commission v. Alabama Northern R. Co. (1913) 182 Ala. 357, 62 So. 749; Railroad Commission v. Alabama G. S. R. Co. (1913) 185 Ala. 354, 362, 64 So. 13, L.R.A.1915D, 98; Missouri, O. & G. R. Co. v. State (1911) 29 Okla. 640, 119 Pac. 117; Chicago, R. I. & P. R. Co. v. State (1923) 90 Okla. 173, 217 Pac. 147; State v. St. Louis S. W. R. Co. (1913, 1918) (Tex. Civ. App.) 165 S. W. 491, 199 S. W. 829, 830), but there is no Federal case in which is built up out of such words as those which we find in the Transportation Act of 1920 authority for requiring such a station.

Without more specific and express legislative direction than is found in the act, we cannot reasonably ascribe to Congress a purpose to compel the interstate carriers here to build a union passenger station in a city of the size and extent and the great business requirements of Los Angeles. The Commission was created by Congress. If it was to be clothed with the power to require railroads to abandon their existing stations and terminal tracks in a city and to combine for the purpose of establishing in lieu thereof a new union station, at a new site, that power we should expect to find in congressional legislation. Such authority, if conferred in Los Angeles, would have application to all interstate railroad junctions, including the numerous large cities of the country, with their residential, commercial, shopping, and municipal centers now fixed and established with relation to existing terminals. It would become a statute of the widest effect and would enter into the welfare of every part of the country. Various interests would be vitally affected by the substitution of a union station for the present terminals. A selection of its site from the standpoint of a city might greatly affect property values and likewise local transportation systems. The exercise of such power would compel the carriers to abandon existing terminals, to acquire new land and rights of way, and enter upon new construction, to abandon large tracts, and to sell territory of the same extent as no longer necessary for the use of the carriers.

There would have to be tribunals to apportion the expenditures and cost as between the carriers. A proper statute would seem to require detailed directions, and we should expect the intention to be manifested in plain terms and not to have been left to be implied from varied regula-

tory provisions of uncertain scope. It would be a monumental work and one requiring the most extensive exercise of expert engineering and railroad construction. It would make possible great changes of much importance in the plans of every city and in the rearrangement and mutations of railroad property and public and private business structures everywhere. We find no statutory preparation for the organization of such machinery.

We cannot agree with the court of appeals of the District in its disposition to view § 3, ¶ 3, as vesting the Interstate Commerce Commission "with almost unlimited power in the matter of establishing terminals and union stations for the proper interchange of traffic between the converging interstate railroad lines." — App. D. C. —, 18 F. (2d) 231. The words, "reasonable, proper, and equal facilities," are, of course, comprehensive enough to include not only trackage, but terminal facilities described as extending a reasonable distance outside of the terminal, but hardly to give the Commission "unlimited power" in the building of union stations.

To attribute to Congress an intention to authorize the compulsory establishment of union passenger stations the country over, without special mention of them as such, would be most extraordinary. The general ousting from their usual terminal facilities of the great interstate carriers would work a change of title and of ownership in property of a kind that would be most disturbing to the business interests of every state in the country.

To recognize what is here sought as within the power of the Commission to order to be done in each of all the great cities throughout the United States and to sustain it as legal, without provision for effective restraint by the carriers, or other interests, would expose the community to possible abuse, with nothing but self-imposed restraint on bureaucratic extravagance.

When the interest of a great city in its improvements is to be promoted entirely at the expense of railroads that enter it, Congress would be expected to hesitate before it would change discretionary leave for the erection of such stations into positive command. In such a case the expenditure of a large amount of capital will not bring with it corresponding increase in the railroad revenues. If Congress had intended to give an executive tribunal unfettered capacity for requisitioning investment of capital of the carriers and the purchase of large quantities of land and material in an adverse proceeding, we may well be confident that Congress would have made its meaning far clearer and more direct than in the present meager provisions of the transportation act. The suggestion of complainants is that out of provisions for local union of main tracks and switching tracks we should use our imaginations and develop them into provisions for giant union passenger stations. It is true that the railway systems may be united through switches and connecting tracks in physical connection, but this has not been held to justify great monumental structures, extended in their complicated machinery and su-

perficial extent and expense. There is a difference of real substance between such connecting tracks and switches and junctions and a passenger metropolitan union station. The latter calls into being a new entity naturally requiring new legislative authority. This court, referring to a kindred matter, said of this case:

"But there is a great difference between such relocation of tracks or local union stations and what is proposed here. The differences are more than that of mere degree; they and their consequences are so marked as to constitute a change in kind." Railroad Commission v. Southern P. Co. (1924) 264 U. S. 331, 346, 68 L. ed. 713, 719, P.U.R.1924D, 246, 44 Sup. Ct. Rep. 376.

But it is said that we have already foreclosed the conclusion in this case by our opinion in 264 U. S. 331, *supra*. The only issue there presented to this court was whether it was necessary to secure from the Interstate Commerce Commission its approval of the construction of a union station and the relocation of the connecting tracks proposed. This point in that case was the necessity for the acquiescence by the Interstate Commerce Commission in respect to a union passenger station. We held such a certificate to be necessary before a union station or connecting lines of interstate carriers could be lawful. That is all we held.

It is quite true that we made references in the opinion to a case foreshadowed in the hypothetical certificates of the Commission in the building of a union station. Such references, had, however, not the slightest significance in respect to who could or should build the station, or whence its cost should be defrayed. It was as far as possible from the purpose of the court in its opinion to indicate its views of the powers which the Commission could exercise adversely to the carriers in compulsory proceedings. They were not before the court for adjudication.

In what situations, if any, action of the Interstate Commerce Commission may be controlled or corrected by mandamus, need not now be considered, because it is apparent that there is here no meritorious basis for exerting such power, even if found to exist.

The judgment of the court of appeals of the District of Columbia is reversed.

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tions would result in higher rates, or poor service, or both. Since the Supreme Court has dictated the actual value as the rate base, the question of watered stock has become of little significance to the utility consumer as such, but it continues to have a bearing on the utility shareholders. With the recent movement of many utilities to stimulate good will and cooperation among its patrons by seeking to make them shareholders of its own securities, it looks as if the Commissions may have to consider whether or not they will protect shareholders' interests as well as those of the ratepayers'.

During the last month the Michigan Commission has committed itself to just such a policy. It has handed down a decision having to do with the sale of nonpar stock by public utility corporations at an increased price over that of an original or previous issue. The order of the Commission is briefly to the effect that such sales will not be permitted except after a showing either of increased value of assets, or a well-demonstrated earning capacity over a period of years warranting such an increase.

This is the first time, according to the Michigan Commission, that an order has been issued passing upon the question of the fluctuating values of nonpar stock in the same financial structure. Commissioner Robert H. Dunn, Chairman of the Michigan body, made a statement regarding the order.

In this statement we are told that on October 31, 1929, the Kohler Aviation Corporation asked the Commission for authority to sell four thousand shares of nonpar stock for a total of $20,000 or $5 a share. Prior to that date the utility had issued thirty-two thousand shares of nonpar stock for $90,000, averaging $2.81 per share. Should the Commission authorize the sale of the additional stock at a different value?

Section 12 of the Michigan Blue Sky Law provided that the *securities commission* should not authorize the sale of nonpar stock at a price in excess of the book value as shown by the company's record, unless there was also a showing made of net earnings of not less than 5 per cent for a period of at least one year immediately preceding the application. But this prohibition was directed only to the securities commission.

Chairman Dunn, in explaining the condition of the Commission, admitted that while the blue sky law covered only the actions of the securities commission, yet the Public Utilities Commission assumed, inasmuch as it had, by statute creating it, full discretionary powers, it could adopt as a policy statutory provisions which were made mandatory on the securities commission, and particularly since the Michigan Public Utilities Commission virtually supplanted the securities commission jurisdiction, when the issues sought to be authorized and sold were public utility securities.

The Commission admitted that a different rule might obtain in different states regarding nonpar stock at different prices, but that in Michigan henceforth the policy of the Commission would be in accord with its decision in the Kohler Case.

Control over Water Carriers Is Denied to Federal Commission

FREEDOM of the seas—from regulation by the Interstate Commerce Commission was the purport of the decision handed down by the United States Court of Appeals from the Fourth Circuit. This significant ruling appears to settle once and for all a rather troublesome bugaboo raised by somewhat ambiguous language of Congress in a clause of the interstate commerce act giving the Commission jurisdiction of water carriers where they engage in the transportation of freight and passengers under "common arrangement" with rail carriers. What was meant by "common arrangement?" This question has been bothering both the steamship companies and the Interstate Commerce Commission for some time.

Some months ago the Interstate Commerce Commission determined to find out just what was meant by the provision and asked the Attorney General to institute a proceeding for the purpose of compelling the Munson Steamship Line to file with the Commission a schedule of its rates and charges for transportation service by water between Baltimore, Maryland, and Florida ports.

The court in denying the application of the Attorney General held that it was the intent of Congress to subject water carriers to Commission jurisdiction only to the extent necessary to prevent evasion of the interstate commerce act by railroad companies.

The court construed the term "common arrangement" to be a compact "between the carriers themselves, giving to one or the other, or both, such an interest in or control over the entire undertaking as to constitute the continuous transportation in some sense a common enterprise; for under no other sort of arrangement would there exist the possibility of manipulating water rates so as to evade the act designed for the regulation of rail carriers."

In other words, the clause was intended to cover only attempts by railroad companies to avoid rate regulation by the subterfuge of carriage by water just as bus companies frequently attempt to evade state regulation by unnecessarily crossing state lines. Bona fide steamship companies, however, operating between United States ports, are still free from any sort of regulation.

Gas Utility Required to Keep Informed on Lower Wholesale Rates

ONE of the major problems in the regulation of gas and electric utilities has been the interstate supply company. This sort of company has been called the "loop-hole of utility regulation" because, being interstate in character, the state cannot control its rates and Congress won't control its rates and so it goes thus far uncontrolled.

But how, the question is asked, can a wholesale supply company be the

means of evading state regulation as long as the local distributing operating utilities are subject to Commission scrutiny? The charge is made that the wholesale company, being controlled by the same holding company as the operating company, can pad its supply rates so that the distributing utility's loss is the supply company's gain, and the money all finds its way into the same pocket.

Whether this situation does actually exist to the extent of being an evasion of law and an oppression of the ratepayers is a rather debatable question. However, it is a fact that once a supply company makes a contract with a distributing utility as to rates, the Commission cannot, in regulating the rates of the latter, go into the reasonableness of the contract charge. Is there any remedy for this situation? So far attempted legislation has failed to clear the constitutional hurdles. The Colorado Commission seems to have found a way out, however, without the need of legislation.

Its action came as the result of an application by the Arkansas Natural Gas Company for a certificate to construct and operate a gas distribution plant in Las Animas and to exercise a 25-year franchise granted by the city. The applicant has a 20-year contract with the Colorado Interstate Gas Company which operates a pipe line between Amarillo, Texas, and Denver to purchase gas for its Las Animas plant at a specified rate per thousand cubic feet.

The Commission, after commenting on its lack of jurisdiction over the rates charged by the interstate pipe line company, stated:

> "Under the legal set-up, therefore, as we understand it, this rate structure for natural gas would practically be 'frozen' and unchangeable for approximately twenty years. If the applicant should at any time during these twenty years be able to obtain natural gas at materially lower charges than those required by the contract, it would be unable to put the same into effect unless this Commission in some manner would protect the public in the certificates herein granted.
>
> "To authorize a certificate that would practically require the same rates for natural gas for a period of twenty years would, in our opinion, be contrary to the public interest."

The Commission granted the authority upon the express condition that if the applicant could obtain natural gas of the same quality in the future at a lower price, it should be required to do so notwithstanding its 20-year contract. The order also directed the applicant to keep itself informed as to the availability of natural gas from other sources at a lower rate.

THE *supreme court of the District of Columbia, on January 31st, decided that a law prohibiting foreign corporations from owning stock of local utilities does not apply to foreign investment trusts. Further mention of this case will be made in the next issue.*